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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Epsilon Energy U.S.A., Inc., :  
vs : 1:21-CV-00658-JPW  
Chesapeake Appalachia, LLC :

BEFORE: HONORABLE JENNIFER P. WILSON  
PLACE: Harrisburg, Pennsylvania  
PROCEEDINGS: Preliminary Injunction  
DATE: Tuesday, May 12, 2021 - VOLUME II  
REPORTED BY: Lori A. Fausnaught, RMR/CRR  
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CLANTON - CROSS

1 (8:41 a.m., convene.)

2 THE COURT: Welcome back everyone. Mr. Clanton, I  
3 remind you that you remain under oath, and we'll now proceed  
4 this morning and pick up with cross on behalf of Defendant.

5 Good morning, Mr. Clanton.

6 THE WITNESS: Good morning.

7 CROSS EXAMINATION

8 BY ATTORNEY BRIER:

9 A. Mr. Clanton, you have before you the Plaintiff's exhibit  
10 binder. Could you please turn to the Plaintiff's Exhibit 30.  
11 Plaintiff's 30 is the December 22 proposal for the Craige 1HL  
12 well. Correct?

13 THE COURT: Mr. Clanton, I think just based on the  
14 size of the ring in that binder, I believe you have Defendant's  
15 binder in front of you rather than Plaintiff's binder.

16 THE WITNESS: Oh. Exhibit 30?

17 ATTORNEY BRIER: Yes, sir.

18 THE WITNESS: There's nothing in Exhibit 30 here.

19 ATTORNEY BRIER: Let's see if we can try another  
20 exhibit. How about 31?

21 THE COURT: It's on the screen.

22 THE WITNESS: I can read it on the screen here.

23 ATTORNEY BRIER: All right. Thank you, Mary, for  
24 putting it on the screen.

25

## CLANTON - CROSS

1 BY ATTORNEY BRIER:

2 Q. So we're looking at Exhibit 30 on the screen, which is the  
3 Craige North 1 LH well. Correct?

4 A. Correct.

5 Q. And that was proposed on December 22 of 2020 by Epsilon.  
6 Right.

7 A. Yes.

8 Q. To be clear, Epsilon had plenary control over when it  
9 decided to make that proposal. Correct?

10 A. We did.

11 Q. And Epsilon had plenary control in terms of not just  
12 deciding when to propose but calculating the 120 days out from  
13 the date from when they anticipated to spud the well. Correct?

14 A. Correct.

15 Q. And in each of the proposals, Plaintiff's Exhibit 31 -- I'm  
16 sorry -- 30, 31, 32 and 33, they are all proposed on  
17 December 22, and they all have an anticipated spud date of  
18 April 22. Correct?

19 A. That's correct.

20 Q. And that's because -- as you testified yesterday, that's to  
21 give the JOA parties 30 days to decide whether to participate,  
22 which takes you to January 22. And then you add the 90 days to  
23 be prepared to spud. Correct?

24 A. Yes.

25 Q. Now, to be fair, the four proposals, none of them make

## CLANTON - CROSS

1 reference to anything other than an anticipated spud date.

2 Correct?

3 A. Yes.

4 Q. There's no reference to boots-on-the-ground. Correct?

5 A. That's correct.

6 Q. There is no reference to commencing operations. Correct?

7 A. Correct.

8 Q. It's a spud date. And in the industry, a spud date is when  
9 the drill bit hits the ground. Correct?

10 A. Generally accepted as that, yes.

11 Q. So you have the rigs on the site?

12 A. You have a rig on-site, yes.

13 Q. The site has been prepared. Correct?

14 A. The site is prepared for drill, yes.

15 Q. All of the necessary work that would need to be done to  
16 spud, including whatever work needs to be done to protect and  
17 shut in the two operating wells on the site, would need to be  
18 done by the time you spud. Correct?

19 A. That is correct.

20 Q. Now, April 22 has passed. We can agree that on April 22 of  
21 2021 Epsilon didn't spud any wells on the Craige pad. Correct?

22 A. Yes.

23 Q. And we can agree that Epsilon didn't have  
24 boots-on-the-ground on April 22, 2021 on the Craige pad.  
25 Correct?

## CLANTON - CROSS

1 A. Right. We had not been allowed to access the site. Yes.

2 Q. You didn't do anything by April 22 on the Craige pad.

3 Correct?

4 A. We couldn't because we were unable to access the site.

5 Yes.

6 Q. So has -- so the proposals on April 22, 2021, according to  
7 your testimony yesterday, expired, didn't they?

8 A. No. The actual commencement of operations would, in fact,  
9 extend the April 22nd timing related to the JOA. Plus, we  
10 have, as is a right under the JOA, extended and exercised the  
11 right to use an additional 30 days to handle permitting,  
12 surface easements as well as curing title.

13 Q. Do you recall testifying yesterday under oath?

14 A. I do.

15 Q. Do you recall that your own counsel asked you a question  
16 that is, and I quote, "If Epsilon does not spud by April 22nd,  
17 2021, what happens?" Do you remember that question?

18 A. I should have said commencement of operations.

19 Q. What you said is the proposals expire. Do you recall  
20 saying that?

21 A. I do. That was a misstatement.

22 Q. Now, your testimony today is it didn't expire because you  
23 have, under the JOAs, in your view, the opportunity to add 30  
24 more days to April 22. Correct?

25 A. That's correct.



## CLANTON - CROSS

1           ATTORNEY BRIER: Mary, would you please put on  
2 Plaintiff's Exhibit 1? And specifically the Craige unit JOA  
3 and specifically page ten. Thank you.

4           Your Honor, this is Plaintiff's Exhibit 1. And I'm on  
5 page ten at the top.

6 BY ATTORNEY BRIER:

7 Q. And in your testimony yesterday, sir, when you referenced  
8 the fact that you have the opportunity for 30 more days, you  
9 were referring to the language that's at the top of page ten of  
10 Exhibit 1 under Article VI which is -- begins on page nine.  
11 Correct?

12 A. Yes.

13 Q. Okay. And the sentence you're referring to is the sentence  
14 that makes reference to the fact that the deadline can be  
15 extended upon written notice of same by operator to other  
16 parties for a period of up to 30 additional days. Right?

17 A. Correct.

18 Q. Now, that written notice wasn't sent to Chesapeake, was it?

19 A. It was not.

20 Q. It wasn't sent to Equinor, was it?

21 A. It was not.

22 Q. It wasn't sent to any JOA parties.

23 A. It has been sent to the consenting JOA parties.

24 Q. Well, the language says -- am I reading it correctly, "Upon  
25 written notice of same by operator to the other parties." It

## CLANTON - CROSS

1 doesn't say the consenting parties. It says to the other  
2 parties, doesn't it?

3 A. Our interpretation is that requirement notice is to the  
4 consenting parties not to the non-consenting parties.

5 Q. But that's not what it says. It says to the other parties,  
6 doesn't it?

7 A. That's what that says, yes. Our interpretation is that  
8 applies to consenting parties, not non-consenting parties.

9 Q. So as you sit in this courtroom today, Equinor, who you  
10 didn't sue, who is not here, has no idea that you have taken an  
11 interpretation of the JOA that entitles you to 30 more days to  
12 begin to spud these wells. Correct?

13 A. That's correct.

14 Q. And you are in active litigation with Chesapeake, and you  
15 didn't send a notice to Chesapeake telling them you were  
16 extending by 30 days. Correct?

17 A. Right. Part of the reason why we had to extend it for 30  
18 days is because we have not had cooperation from Chesapeake and  
19 we were unable to secure our permits.

20 Q. Why didn't you send it to Equinor?

21 A. They are a non-consenting party.

22 Q. But it doesn't say anything about consenting or  
23 non-consenting. We can agree on that?

24 A. I think we have answered that.

25 Q. What?

## CLANTON - CROSS

1 A. I think we have answered that.

2 Q. More importantly, that language that you are relying on is  
3 part of a sentence that starts with the following on line  
4 three. Please read along with me. "If all parties to whom  
5 such notice is delivered elect to participate in such a  
6 proposed operation, the parties shall be contractually  
7 committed to participate therein." And the sentence doesn't  
8 end until down on line ten. That's all one sentence, from line  
9 three to line ten. Correct?

10 A. Correct.

11 Q. And you're asking this Court to interpret this JOA to say  
12 that that's the sentence that gives you the right unilaterally  
13 to extend the April 22 deadline by 30 more days. Correct?

14 A. That is the provision that we have exercised and called  
15 upon to exercise, the 30 days.

16 Q. Let's talk about the four wells at issue. Isn't it true  
17 that not all parties that received the December 22 notices have  
18 elected to participate?

19 A. In other words, that are non-consenting parties to the well  
20 proposal?

21 Q. Right.

22 A. Yes.

23 Q. And in fact, for the three proposals that are the Craige  
24 North proposals, three run north and one runs south. Right?

25 A. Yes.

## CLANTON - CROSS

1 Q. For the three that run north, nobody has elected to  
2 participate. Correct?

3 A. Epsilon has elected to participate. Obviously we proposed  
4 the well, so the other parties --

5 Q. No other JOA party has elected to participate?

6 A. That's right.

7 Q. And despite that, it's this provision that says as a  
8 condition to everything that follows in the sentence, "If all  
9 parties to whom such notice is delivered elect to participate  
10 in such a proposed operation" -- then it goes on. Later in the  
11 sentence it says that the operator can extend it by 30 days by  
12 giving written notice. Correct?

13 A. Right.

14 Q. There is no provision in this JOA that speaks to the  
15 situation where a proposal is made, there are non-consenting  
16 parties, and the person that makes the proposal wants to  
17 unilaterally extend its own deadline by 30 days. Isn't that  
18 true?

19 A. I don't know that I share that interpretation, no.

20 Q. Your interpretation is that the language at the beginning  
21 of the sentence, "If all parties to whom such notice is  
22 delivered elect to participate" is applicable here even though  
23 on each one of these proposed wells there are parties who  
24 didn't elect to participate. Right?

25 A. There are non-consenting parties in the proposals, yes.

## CLANTON - CROSS

1 Q. What do you think that language means, "If all parties to  
2 whom such notice is delivered elect to participate"? What do  
3 you think it means? Does it mean anything to you?

4 A. We have provided notice to the consenting parties who had  
5 elected to participate.

6 Q. Please try to answer my question. It says, "If all parties  
7 to whom such notice is delivered" -- and to be clear, we're now  
8 talking about the June -- I'm sorry -- the December 22  
9 proposals, Exhibits 30 to 33. Correct?

10 A. Um-hum. Correct.

11 Q. That's the notice. And the next clause is, elect to  
12 participate. Correct?

13 A. Correct.

14 Q. All parties that receive the notice elect to participate.  
15 And it's your position that even though there are  
16 non-consenting parties who didn't elect to participate, this  
17 sentence gives you the right to add on 30 days. Right?

18 A. Yes.

19 Q. If you didn't have that provision that gives you the right  
20 to add on 30 days, in your world view, these proposals expired  
21 on April 22, didn't they?

22 A. I guess.

23 Q. I don't want to belabor it, but the other part of the  
24 sentence that we disagree about is the part that says written  
25 notice. And this is in lines -- I'm sorry. I lost my place.

CLANTON - CROSS

1 ATTORNEY KROCK: Seven.

2 ATTORNEY BRIER: Thank you.

3 BY ATTORNEY BRIER:

4 Q. The end of line seven it says, "Written notice of same by  
5 operator to the other parties." That's the language we  
6 disagreed about. You said that only applies to consenting  
7 parties. But the JOA doesn't say consenting parties, it says  
8 to other parties.

9 A. My interpretation of the obligation set out in the JOAs  
10 that notice is required for the consenting parties.

11 Q. Okay. Now, if you would, sir, if you look at the top of  
12 page 11 of the same JOA. And you were asked about this  
13 yesterday at lines one through three. The Judge actually had  
14 some questions about this.

15 And it says, "If 100 percent subscription of the  
16 proposed operation is obtained, the proposing party" -- that's  
17 Epsilon. Right?

18 A. Yes.

19 Q. -- "shall promptly notify the consenting parties of their  
20 proportionate interest in the operation, and the party serving  
21 as operator shall commence such operation within the period  
22 provided by Article, Roman numeral, VI.B.1, subject to the same  
23 extension as provided herein." Right?

24 A. Yes.

25 Q. And I think the Judge asked you or Counsel asked you

## CLANTON - CROSS

1 what -- would you agree that there is no Article VI.B.1 in this  
2 JOA?

3 A. That's right.

4 Q. As of today, who's the operator on the Craige pad?

5 A. Chesapeake Appalachia.

6 Q. And they're still serving as operator today. Right?

7 A. Correct.

8 Q. And about that point, if you would look back on page ten of  
9 the JOA, it talks about -- and this is, again, at lines --  
10 never mind. I'll skip that.

11 You also made reference to Article XVI of the JOA.  
12 Said that that gives Epsilon some authority to control the  
13 pacing of its drilling and completion operations. Correct?

14 A. What do you mean by pacing?

15 Q. Well, let's look at Article XVI. Pacing is my word so I  
16 understand why you want to clarify. If you would look at page  
17 27, please, sir.

18 Thank you, Mary, for helping follow along here.

19 This is Article XVI, page 27 of Exhibit 1. 2(a) at  
20 the bottom, it says, "Proposal for horizontal well operation  
21 shall include the following, the estimated commencement date."  
22 Right?

23 A. Yes.

24 Q. What estimated commencement date did Epsilon pick in the  
25 four proposed wells that we're here about?

## CLANTON - CROSS

1 A. We chose the commencement date of April 22nd.

2 Q. Okay. So irrespective of whether you picked it under  
3 Article XVI as April 22nd or under some other calculation of  
4 the JOA, you guys picked April 22nd?

5 A. That's correct.

6 Q. I'm sorry. I'm jumping back to page ten one last time.

7 Mary, if you could put page ten on the screen, please.

8 And I'm looking at line ten. Please read along with  
9 me, sir. It says, "If the actual operation has not been  
10 commenced within the time provided, including any extension  
11 thereof as specifically permitted herein or in the force  
12 majeure provisions of Article XI, and if any party hereto still  
13 desires to conduct said operation, written notice proposing  
14 same must be resubmitted to the other parties in accordance  
15 herewith as if no prior proposal had been made."

16 Correct?

17 A. Right.

18 Q. Is it your understanding that if this Court denies  
19 Epsilon's request, nothing to prevent Epsilon from starting the  
20 clock over and from re-proposing these wells, is there?

21 A. Well, since we're still under the valid proposal timeframe,  
22 we still have the opportunity to file a force majeure so these  
23 proposals can remain active.

24 Q. You have the opportunity to what?

25 A. To extend these proposals due to the outcome of this case.



## CLANTON - CROSS

1 Q. So are you telling this Court that you guys are going to  
2 view the ruling of this Court as a force majeure? Is that the  
3 decision that's been made?

4 A. You asked me in context if the actual operation had not  
5 been commenced within the time provided, it sets out there a  
6 stipulation provided, including the extension thereof, as  
7 specifically permitted hereunder or in the force majeure  
8 provisions of Article XI.

9 I was answering that in the context of your question.

10 Q. But my question is, is that the position of your company  
11 today, that if the Court doesn't grant the relief, you are  
12 going to take the position that the deadline is extended under  
13 the force majeure?

14 ATTORNEY MADRIZ: Your Honor, I'm going to object to  
15 that question. Mr. Clanton is here in his personal capacity.  
16 He's not here as the corporate representative of Epsilon. He  
17 can't answer that question.

18 ATTORNEY BRIER: Your Honor, this gentleman is the  
19 chief operating officer. He just injected an issue into the  
20 case that I didn't inject. And he's suggesting that there's an  
21 interpretation that the company is going to invoke. It feels  
22 like it would go to the heart of the issue before this Court,  
23 and I think it's a totally fair question.

24 ATTORNEY MADRIZ: Your Honor, permission to respond  
25 again.

## CLANTON - CROSS

1 THE COURT: Please.

2 ATTORNEY MADRIZ: The question was about his  
3 understanding of the provision, and Mr. Clanton responded.  
4 Right now we're delving into what will the company do if an  
5 unspecified set of events occurs. That's -- he's actually --  
6 opposing Counsel is actually asking the witness to speculate.

7 THE COURT: Well, inasmuch as I have to determine if  
8 there would be irreparable harm from denying the preliminary  
9 injunctive relief, and inasmuch as we have spent a great deal  
10 of time questioning Mr. Clanton about this precise issue;  
11 namely, what happens if the proposal expires, I think the  
12 question is fair on cross-examination and necessary to this  
13 Court's analysis.

14 The first time I've heard that Mr. Clanton is here in  
15 his individual capacity is in your objection. So, this is not  
16 a 30(b)(6) deposition. You introduced him as the chief  
17 operating officer of the Plaintiff. So I'm not understanding  
18 your argument that he can't testify to the company's position.

19 ATTORNEY MADRIZ: My apologies, Your Honor. I  
20 actually thought I was presenting him in his individual  
21 capacity. But my objection doesn't -- I guess the heart of my  
22 objection goes to the fact of what the question is asking is  
23 what will Epsilon do if this Court denies the temporary  
24 injunction request. And one of the issues that Mr. Clanton  
25 raised is that there is an exception on how to extend based on

## CLANTON - CROSS

1 force majeure.

2 They're asking for a legal interpretation of that  
3 provision. I'm not 100 percent sure Mr. Clanton has the  
4 ability to testify on that issue because we haven't, as their  
5 lawyers, actually been involved in that process.

6 THE COURT: Okay. I'll overrule your objection. I  
7 don't have the benefit of real-time right at the moment. My  
8 understanding was that the question was -- the question posed  
9 to Mr. Clanton was what will you do in the event that the Court  
10 denies injunctive relief. And I think Mr. Brier was asking  
11 would you agree that you, on behalf of Epsilon, that Epsilon  
12 would resubmit a proposal. And Mr. Clanton's answer, as I  
13 understood it so far, was no, I don't think we would be  
14 required to do that. We would invoke the force majeure  
15 provision in the JOA. That's the testimony thus far.

16 So the objection is overruled.

17 BY ATTORNEY BRIER:

18 Q. Let me reframe this so that we're clear. Would you agree  
19 with me that if the Court denies your injunctive request, under  
20 the terms of the JOA you have the right to re-propose as if no  
21 prior proposal had been made?

22 A. Correct.

23 Q. And the practical effect of that is if the Court denies it,  
24 the next day, based on all the work you've already done, you  
25 can re-propose and reset the clock and move the spud date out

## CLANTON - CROSS

1 120 days. Right?

2 A. Right.

3 Q. Is it correct, sir, that Epsilon applied for the permits to  
4 drill the four proposed wells from the Pennsylvania Department  
5 of Environmental Protection before it even proposed the wells  
6 to the JOA party?

7 A. That's correct.

8 Q. I'm going to move away from the JOAs, sir. If we could  
9 look at Exhibit 7. Plaintiff's Exhibit 7, this is the  
10 settlement agreement that's been admitted into evidence.

11 If you could put paragraph eight on the screen,  
12 please. It's page three.

13 You were present when the chief executive officer  
14 testified yesterday, weren't you, sir?

15 A. I was.

16 Q. Did you hear him testify that the settlement agreement did  
17 not modify, amend or revise the JOAs between the parties?

18 A. I did.

19 Q. Do you agree with that?

20 A. I do.

21 Q. So whatever rights Chesapeake had as the operator before  
22 the settlement agreement was entered into, it had after the  
23 settlement agreement was entered into because the JOA was not  
24 amended. Right?

25 A. The JOA was not amended.

## CLANTON - CROSS

1 Q. Whatever rights Equinor had, it had before and after the  
2 settlement agreement.

3 A (Witness nodded in the affirmative.)

4 Q. Correct?

5 A. All parties under that JOA still had their rights, yes.

6 Q. And the other parties, the absent JOA parties weren't even  
7 involved in the settlement agreement, had no opportunity to  
8 have any input into it, did they?

9 A. I don't believe they did.

10 Q. And it's not your position -- well, I'll strike that.

11 If we could look at Plaintiff's Exhibit 45, please.  
12 This was one that was not in the binder, Judge. It was handed  
13 up towards the end of Mr. Clanton's direct.

14 THE COURT: Yes.

15 ATTORNEY BRIER: It's the string e-mail.

16 THE COURT: Yes.

17 BY ATTORNEY BRIER:

18 Q. I don't know if you have that one, do you, Mr. Clanton?

19 A. No, sir. But you can put it on the screen here, I think.

20 Q. And if you could please -- yeah, we're on the right page.

21 So Mr. Clanton, on October 15, 2020 you sent an e-mail  
22 to Julie Woodard, and this is after an exchange that started as  
23 early as May of 2020, about your company's interest in  
24 developing the Auburn gas gathering system. Correct?

25 A. Developing wells within the Auburn gas gathering system,

## CLANTON - CROSS

1 yes.

2 Q. That's definitely more precise. Thank you. And that  
3 process started in May, and there was a lot of back and forth.  
4 It became clear that there had been a disagreement between  
5 Chesapeake and Epsilon regarding the JOAs. Correct?

6 A. It actually started before May. It was Q-1.

7 Q. Q-1 of 2020?

8 A. Yes.

9 Q. So we're now here a full year later. Right? It's May of  
10 '21. Was it such an emergency in May of '20 about the  
11 irreparable harm that you are claiming you're going to suffer  
12 that you put it in an e-mail, that you went to court or asked  
13 for immediate relief?

14 A. I think it's evidenced by our attentiveness to development  
15 and our ongoing dialogue; direct, constant, continual dialogue  
16 that the development in Auburn is a priority and was not  
17 receiving priority status by the operator.

18 Yes, it's obvious there is damage potentially  
19 occurring here, I think one would agree. We also stated that  
20 verbally to personnel within Chesapeake as we were having these  
21 discussions.

22 Q. I will always give you an opportunity to explain, but I  
23 want you to first answer my question.

24 A. Okay.

25 Q. My question was as early as Q-1 2020, Epsilon was concerned

## CLANTON - CROSS

1 that Chesapeake disagreed with Epsilon's rights under the JOA.  
2 Right?

3 A. That we disagreed with Chesapeake's right under the JOA?

4 Q. Chesapeake and Epsilon disagreed about their rights under  
5 the JOA.

6 A. I think we disagreed about the pace of development of  
7 Auburn.

8 Q. Okay. My question is if it's an emergency today, this  
9 Court has to make a determination as to whether there's  
10 immediate and irreparable harm about to be visited upon  
11 Epsilon.

12 My question is you didn't go to court in Q-1, 2020 to  
13 ask for relief because of some immediate or irreparable harm  
14 that was going to happen, did you?

15 A. We did not.

16 Q. You did not go in Q-2, 2020, did you?

17 A. We did not.

18 Q. You didn't go in Q-3, 2020, did you?

19 A. We did not.

20 Q. You didn't go in Q-4, 2020, did you?

21 A. We did not.

22 Q. But in Q-1, 2021 you went to court?

23 A. During all four of those timeframes, we were still  
24 unaware -- can I respond?

25 Q. Yeah, go ahead.

## CLANTON - CROSS

1 A. So you're making the point that development was not  
2 important to us in Q-1 of 2020. I disagree. You were making  
3 the point that development in Auburn is not important to us in  
4 Q-2, 2020. I disagree. You made the point that development in  
5 Auburn in Q-3, 2020 was not important. I disagree. You made  
6 the point that in Q-4, 2020 development in Auburn was not  
7 important to Epsilon. I disagree.

8 I think these e-mail exchanges point out the need for  
9 development -- our need for development in Auburn.

10 Now, we were unaware of what potential development  
11 plans, and we were trying to gain discovery and understanding  
12 of what those might be, to keep open and available to us all  
13 types of actions necessary, including lawsuits, if, in fact,  
14 Chesapeake was not going to develop Auburn or if Chesapeake was  
15 going to obstruct us from trying to get development in Auburn.

16 I hope that answers your question.

17 Q. I am afraid it didn't. But let me focus on what I wanted  
18 to focus on. There is no dispute that Epsilon, in every one of  
19 the quarters of 2020, had an interest in developing Auburn.  
20 That's not what this case is about.

21 This case is about whether there is immediate and  
22 irreparable harm about to be visited upon Epsilon if the Court  
23 denies the request.

24 My point is you didn't view it as immediate and  
25 irreparable all the way through 2020 during this e-mail



## CLANTON - CROSS

1 exchange. And the first time you came to court and said that  
2 there was immediate and irreparable harm was in the first  
3 quarter of this case. Correct? That's a yes --

4 A. No, that's not correct.

5 Q. -- or no.

6 A. Just because we did --

7 Q. Sir --

8 A. -- not state to Chesapeake in -- this e-mail string does  
9 not indicate that because there was not irreparable harm  
10 potentially occurring doesn't mean that that was not the case.

11 Q. My question was you didn't go to court, did you?

12 A. We were understanding what development plans or lack  
13 thereof --

14 Q. Why didn't you answer the question that you didn't go to  
15 court. Did you go to court?

16 A. We did not go to court.

17 Q. And the same drainage concerns that you talked about  
18 yesterday on the offsetting wells of a competitor existed in  
19 the fourth quarter of 2020. Correct?

20 A. We made Chesapeake aware of those.

21 Q. The same drainage concerns. Right?

22 A. Yes.

23 Q. And they existed in the third quarter of '20?

24 A. And the fourth quarter.

25 Q. And the second quarter of '20.

## CLANTON - CROSS

1 A. All quarters.

2 Q. And that's the drainage concern that you say this Court  
3 should drop everything, re-do its schedule and grant you relief  
4 now, because that drainage concern is so critical to you and  
5 can't be quantified in money damages. Right?

6 A. Yes.

7 Q. Now, can we agree that of the four proposed wells, the  
8 three Craige North wells that run north off the pad all go into  
9 leased territory that is leased by Epsilon and Chesapeake?

10 A. Yes.

11 Q. So there is no drainage concern going north, because to the  
12 extent you are capturing minerals, you're not hurting yourself.  
13 You have the least minerals in the proposed wellbores.

14 Correct?

15 A. Correct. There is no risk of loss of reserves to offset  
16 operators in that case.

17 Q. So this Court doesn't need to concern itself with whether  
18 you have suffered some immeasurable damage by the delay on the  
19 three Craige North wells, because to the extent there's been  
20 delay, those minerals are still there, and to the extent they  
21 are being captured by anybody, they are being captured by  
22 Chesapeake and Epsilon in the leased properties. Correct?

23 A. There is a consideration -- yes, there is no loss of that  
24 reserve to offset operators in the scenario you have painted.  
25 There is a reduction of value for the production and capture of

## CLANTON - CROSS

1     those reserves.

2             And to the extent development can occur timely, the  
3     lack of development is causing us loss of value.

4     Q.   Well, that's -- doesn't that depend on the strip price, the  
5     commodity price of gas?

6     A.   There are considerations to include; time, value, money  
7     being the predominant factor.

8     Q.   Isn't the strip price higher than it was in 2020?

9     A.   Yes, it is.

10    Q.   You want this Court to believe that because they weren't  
11    developed in 2020 and they're still there, there has been a  
12    loss of value even though the strip price is higher today than  
13    --

14    A.   There is other considerations.   For instance, the costs of  
15    services may go down.   So our return on capital during those  
16    lower price environments may actually improve the  
17    profitability.

18             So while there may be lower gas price, we may get to  
19    develop those reserves at a lower cost and actually have  
20    improved profitability.   So you cannot hold out commodity  
21    prices as a one-and-only exclusive measure of profitability.

22    Q.   And it's a very significant one?

23    A.   It is.

24    Q.   And it has gone up?

25    A.   It has.

## CLANTON - CROSS

1 Q. To the extent there are other costs, you have not  
2 quantified them, and you are not here telling the Court that if  
3 you developed these wells in 2020, you would have saved money?

4 A. No. You had indicated a hypothetical, and I was responding  
5 to the hypothetical.

6 Q. I appreciate that. But the Court needs to decide whether  
7 there is anything before it that it can hold onto to make a  
8 decision. You haven't quantified any economic harm as resulted  
9 from the delay of the development of the minerals, have you?

10 A. It's difficult to quantify.

11 Q. So we can agree on this, though. Of the three of the four  
12 wells, they go into your own leased territory. The fourth well  
13 that's the Craige South well has Cabot property, property that  
14 Cabot currently has a lease interest in that is next to where  
15 the Craige South wellbore would go. Correct?

16 A. That is correct.

17 Q. And you sold Cabot that property in 2019, didn't you?  
18 Didn't Epsilon sell Cabot that property?

19 A. We exchanged properties.

20 Q. And you were paid \$1.375 million for that property, weren't  
21 you?

22 A. I'm not aware of the dollar amount of that transaction.

23 Q. Well, you signed the assignment of the lease interest to  
24 Cabot in 2019 and it's for the property immediately next to  
25 where the proposed Craige South well is, isn't it?

## CLANTON - CROSS

1 A. We have sold properties to Cabot, yes.

2 Q. Immediately next to where the Craige South wellbore is  
3 proposed. Correct?

4 A. Correct.

5 Q. Good. And you were paid for that, weren't you?

6 A. Yes.

7 Q. That didn't come out in your testimony yesterday, did it,  
8 when you were talking about drainage?

9 A. I don't remember that being asked of me, no.

10 Q. So looking at Exhibit 45, sir, your e-mail to Julie  
11 Woodard. This is going to take a little bit of concentration,  
12 and I hope I don't overly complicate it. But your e-mail  
13 starts with the phrase, "Julie, sorry for the delay in  
14 responding to your question on September 29th."

15 So this October 15 e-mail is a response to a question  
16 Julie asked you on September 29th. Right?

17 A. Yes.

18 Q. So if we could go to pages six and seven of Exhibit 45. On  
19 the bottom of six, there's a September 29 e-mail from Julie to  
20 you where she says, "Thanks for the quick response, Henry. I  
21 certainly understand what your goals are. I know those haven't  
22 changed." Then over on the top of seven, "Can you verify which  
23 article of the JOA you are relying on?"

24 That's the question that you are responding to on  
25 October 15 on page one of P-45, isn't it?

## CLANTON - CROSS

1 A. That's correct.

2 Q. And Julie is asking you what question of the -- I'm sorry.  
3 Which article in the JOA are we relying on, because she's  
4 responding to your e-mail below, the September 28 e-mail where  
5 you layout the three options that you talked about yesterday;  
6 one of them being that if Chesapeake elects not to participate  
7 and declines to operate, the consenting party or parties have  
8 the right to operate. Correct?

9 A. Yes.

10 Q. So you assert that position to her in Q-3 of 2020. She  
11 asks you which article in the JOA are we relying on, and on  
12 October 15 you give her your answer?

13 A. Um-hum.

14 Q. Correct?

15 A. Correct.

16 Q. And you track her language -- I'm sorry. You tracked the  
17 language where it says, "If Chesapeake elects not to  
18 participate and declines to operate" in your response on  
19 October 15. "If Chesapeake elects not to participate and there  
20 is 100 percent subscription of the proposals" --

21 A. Excuse me. Do we have a paper copy that I can refer to the  
22 entire document while this line of questioning is occurring?

23 Q. I apologize.

24 ATTORNEY MADRIZ: That exhibit may be in your --

25 THE WITNESS: It's not.

## CLANTON - CROSS

1 THE COURT: He has already indicated that it is not,  
2 nor are several others.

3 THE WITNESS: Can we make a copy of that? It's hard  
4 to follow along on the screen.

5 THE LAW CLERK: I have a copy.

6 THE COURT: Is it unmarked?

7 THE LAW CLERK: Yes.

8 THE COURT: My law clerk will provide a copy to the  
9 witness.

10 THE WITNESS: Thank you.

11 THE COURT: Thank you, Mr. Thomas.

12 ATTORNEY BRIER: Let me know when you are ready, sir.

13 THE WITNESS: Yes, please proceed.

14 BY ATTORNEY BRIER:

15 Q. My point was in your response to Julie on October 15, you  
16 are tracking the scenario where a non-operator proposes,  
17 Chesapeake elects not to participate.

18 Then you say, "If there is 100 percent subscription of  
19 wells, our interpretation of the article" -- what article are  
20 you talking about there, VI?

21 A. VI, yes.

22 Q. -- "of the article is that the incumbent operator,  
23 Chesapeake, would serve as operator on behalf of the consenting  
24 parties." That was your opinion on October 15?

25 A. That was one of the three alternatives, yes.

## CLANTON - CROSS

1 Q. Well, it doesn't say anything about the three alternatives.  
2 You answer her question, don't you, which is which article in  
3 the JOA are you relying on?

4 A. VI.

5 Q. And then you reference the language that's on the top of  
6 page 11 of the JOA, which is when there's 100 percent  
7 subscription -- let me be precise. "If there is 100 percent  
8 subscription to the proposed operation, the proposing party  
9 shall promptly notify the consenting parties of their  
10 proportionate interest in the operation, and the party serving  
11 as operator shall commence operation."

12 That's what you quote back to her, don't you?

13 A. Where were you quoting that from?

14 Q. From the JOA, page 11.

15 A. Please put that on the screen.

16 Q. Lines one to three, sir, on the screen.

17 A. Yes.

18 Q. And to eliminate all doubt, you actually identified  
19 Chesapeake as the incumbent operator in your response to Julie.  
20 Right?

21 A. Yes.

22 Q. This was after the settlement agreement in federal court,  
23 wasn't it?

24 A. Yes.

25 Q. October 15, 2020?



## CLANTON - CROSS

1 A. Um-hum.

2 Q. And you're careful in here to say, "Following our internal  
3 review of the relevant JOAs." Who is our? Who was involved in  
4 this?

5 A. Our company.

6 Q. Mr. Raleigh?

7 A. Mr. Raleigh is involved.

8 Q. So he shared this view?

9 A. This was the company view.

10 Q. You were involved?

11 A. I was.

12 Q. You guys are the two most senior people in the company?

13 A. We are.

14 Q. Now, can we agree that the October 15 e-mail to Julie makes  
15 no reference whatsoever to Article VI.2(a) of the JOAs that you  
16 are asking this Court to determine allows you to go ahead as  
17 the operator on these wells?

18 A. Yeah. That may have been my omission on the location of  
19 the article there. But yes, we did not mention it in an  
20 e-mail.

21 Q. Well, it's not just an admission of the location. You  
22 quote language from a separate part of the article. Right?  
23 "If there is 100 percent subscription."

24 A. We were showing one of the three alternatives that we had  
25 set out to Julie on September 28th. The three options as we

## CLANTON - CROSS

1 set out in our understanding of the JOA were Chesapeake as the  
2 incumbent operator had to -- on proposals submitted by  
3 non-operators had the right to consent and operate. They had  
4 the right to --

5 Q. I don't want to interrupt you, but we're not here on that.  
6 Is that right? That's not what this case is about.

7 A. That's the basis for which I was answering these questions  
8 to Julie.

9 Q. The scenario we're here on is you proposed Chesapeake  
10 elected not to participate and Chesapeake also has decided not  
11 to operate.

12 A. And we didn't know that at the time I responded to Julie.  
13 We then filed the well proposals, and that's when Chesapeake,  
14 as is their option, elected not to operate. That was not  
15 necessarily the scenario under consideration between us and  
16 Julie at the time.

17 Q. It's what your September 28 e-mail says. It says, "In the  
18 scenario where Chesapeake elects not to participate and  
19 declines to operate, the consenting party or parties have the  
20 right to operate." Right?

21 A. Right.

22 Q. And she is --

23 A. But we didn't know at that point if Chesapeake was going to  
24 decline to operate.

25 Q. But that's what you were speaking to, that scenario?

## CLANTON - CROSS

1 A. What scenario?

2 Q. And she says what article of the JOA are you relying on,  
3 and you don't cite Article VI.2(a) and you don't even make  
4 reference to the language in VI.2(a) in the first paragraph.  
5 Correct?

6 A. Right.

7 Q. I'm going to ask -- in the other binder, sir, if you would  
8 look at Exhibit 40.

9 ATTORNEY BRIER: Judge, this is in the Defense binder,  
10 40.

11 THE COURT: In the future, two binders might have been  
12 easier. I have to say the D-rings are giving me trouble. Just  
13 word to the wise, two smaller binders might be easier for  
14 everybody.

15 ATTORNEY BRIER: Judge, it's proof positive that I  
16 have no authority in our law firm.

17 THE COURT: You prefer the smaller ones, too.

18 ATTORNEY BRIER: I have shared your view for a long  
19 time, and I cannot get people to buy smaller binders.

20 THE COURT: Perhaps I will reconsider a revision to my  
21 preferences on the website.

22 BY ATTORNEY BRIER:

23 Q. I hope everybody has before them a section of the  
24 Pennsylvania Code. Do you have that in front of you, sir?

25 A. I do, sir.

## CLANTON - CROSS

1 Q. Let's just take a look at where this is housed. On the top  
2 of the paper on the screen, this is part of the DEP  
3 Environmental Protection Code. The subpart C is protection of  
4 the natural resources. Correct?

5 A. Right.

6 Q. And then subchapter (c) is environmental protection  
7 performance standards. Do you see that?

8 A. Yes.

9 Q. You would agree if Epsilon were to be permitted, under some  
10 interpretation of the JOAs, to have the right to go in and  
11 drill and operate these wells, you would be subject to this  
12 area of review regulation. Correct?

13 A. Yes.

14 Q. Now, I want to spend just a minute on it. Subparagraph (a)  
15 says, "The operator shall identify the source and bottomhole  
16 locations of any of the following; having wellbore paths within  
17 1,000 feet measured horizontally from the vertical wellbore and  
18 1,000 feet from the surface above the entire length of the  
19 horizontal wellbore."

20 And then you have to look at the five subparts of (a),  
21 and it's active wells, inactive wells, orphan wells, abandoned  
22 wells and plugged and abandoned wells.

23 Now, as you sit here today, has Epsilon identified all  
24 of those wells within 1,000 feet of the vertical and horizontal  
25 bores on the four proposed wells?

## CLANTON - CROSS

1 A. Yes.

2 Q. You have?

3 A (Witness nodded in the affirmative.)

4 Q. Have you complied with section three, which says that you  
5 must submit a questionnaire by certified mail on forms provided  
6 by the Department to landowners whose property is within the  
7 area identified in (a)?

8 A. We have not.

9 Q. So today is May 12th. Right?

10 A. Right.

11 Q. You want this Court to grant your relief by May 22, if I  
12 understand your position. Right?

13 A (Witness nodded in the affirmative.)

14 Q. You've known about this regulation because you have just  
15 said you complied with section subpart (a). Correct?

16 A (Witness nodded in the affirmative.) Yes.

17 Q. But you haven't sent the questionnaires to the landowners,  
18 as required by the regulation?

19 A. No. We have to have cooperation from the operator in many  
20 of these matters, this being one of them. So we need to be  
21 able to cooperate with each other, and we're not getting that  
22 cooperation from Chesapeake.

23 Q. You can't tell from public records who the landowners are  
24 within the property defined?

25 A. Right. We are not ready to send the notice out until we

## CLANTON - CROSS

1 are clear as to when we can have -- be granted access to the  
2 site. And Chesapeake has not been granting us access with a  
3 clear line of sight of when we would have access to the site.

4 Q. My question --

5 A. So these notices are not necessary until we have clear  
6 access of site.

7 Q. My question is very simple. Epsilon has the ability to  
8 identify the landowners without any help from Chesapeake, don't  
9 they?

10 A. They do.

11 Q. You haven't done it, have you?

12 A. We have identified the wells. I'm not sure if we have got  
13 it all the way to the landowner list, but I can't respond that  
14 to that.

15 Q. You are the chief operating officer. Are you able to tell  
16 the Court whether you have sent the questionnaire --

17 A. The questionnaires have not been sent.

18 Q. Now there's a lot of paper in this case. I haven't seen  
19 any paper where anyone from Epsilon wrote to Chesapeake and  
20 said we need your cooperation to complete Title 25 of the  
21 Pennsylvania Code, Section 78a.52a. There is no letter like  
22 that, is there?

23 A. Yes. We were seeking support from Chesapeake on a  
24 multitude of matters across the functional groups, including  
25 regulatory.

## CLANTON - CROSS

1 Q. You are under oath. Did you send a letter to Chesapeake  
2 asking them to help you complete this?

3 A. Not that specific form, but we did request help on  
4 regulatory matters.

5 Q. Now, if you would turn to the second page of Exhibit --  
6 Defense Exhibit 40.

7 At the top subpart (c)(3), it says, "The operator  
8 shall submit a report summarizing the review, including" -- and  
9 then (3) is -- "a monitoring plan for wells required to be  
10 monitored, including the methods the operator will employ to  
11 monitor these wells." You haven't done that, have you?

12 A. We have not.

13 Q. And subpart (d) says, "You, shall within at least 30 days  
14 prior to the start of drilling, submit the required report  
15 under subsection C." You haven't done that either, have you?

16 A. Correct.

17 Q. Now, subpart (e) says the following, and tell me if I'm  
18 reading this correctly. "The Department may require other  
19 information necessary to review the report submitted under  
20 subsection C. The Department may make a determination that  
21 additional measures are needed on a case-by-case basis to  
22 ensure the protection of the waters of the Commonwealth."

23 Did I read that right?

24 A. Yes.

25 Q. So this is a regulation that operators have to comply with

## CLANTON - CROSS

1 to protect the public safety of the waters of the Commonwealth.  
2 Isn't that true?

3 A. Um-hum.

4 Q. Is that a yes?

5 A. Yes, that's a yes.

6 Q. And the Department has no ability to determine whether it  
7 needs more information from you to decide whether you can go  
8 forward, because you haven't even submitted the report required  
9 for their review. Correct?

10 A. That's correct.

11 ATTORNEY MADRIZ: Your Honor, I'm going to object.  
12 The witness was asked and answered this line of questioning  
13 repeatedly.

14 ATTORNEY BRIER: I'm not going to ask it again, Judge.  
15 I just want to ask --

16 THE COURT: The objection is sustained, for what it's  
17 worth. It may be a moot point.

18 BY ATTORNEY BRIER:

19 Q. I want to talk to you, sir, about some testimony from  
20 yesterday. By the way, did I read Epsilon's 10(q) correctly;  
21 that Epsilon has nine employees?

22 A. Yes.

23 Q. So at the end of December of 2020, Epsilon had nine  
24 full-time employees?

25 THE COURT: I'm sorry. Mr. Brier, which Epsilon are



## CLANTON - CROSS

1     you referring to?

2             ATTORNEY BRIER: That's my next question.

3             THE COURT: Okay.

4     BY ATTORNEY BRIER:

5     Q. That's the entire family of Epsilon entities, isn't it?

6     A. Yes.

7     Q. That's the parent LTD and then Epsilon Energy U.S.A.,  
8     Epsilon Operating and Epsilon Gathering. Those four corporate  
9     entities have a grand total of nine employees?

10    A. Correct.

11    Q. A third of this company has been in this courtroom. Right?

12    A. Yes.

13    Q. Now, do you know what a collision survey is?

14    A. Yes.

15    Q. Have you prepared one for the proposed wells?

16    A. Yes.

17    Q. Where is it?

18    A. We have it.

19    Q. Has it been sent to anybody?

20    A. Who does it need to be sent to?

21    Q. Has it been shared with any of the joint operating parties?

22    A. Who does -- nobody has requested it.

23             THE COURT: Sir, the question was a yes or no. If it  
24     has not been sent, it would be a no.

25             THE WITNESS: Thank you. No.

## CLANTON - CROSS

1 BY ATTORNEY BRIER:

2 Q. Have you performed a risk assessment of the four proposed  
3 wells?

4 A. Yes.

5 Q. Has that been shared with any of the joint operating  
6 parties?

7 A. No.

8 Q. Have you produced a rig layout?

9 A. Yes.

10 Q. Has that been shared with anybody?

11 A. No.

12 Q. Including Chesapeake, who currently operates the pad.  
13 Right?

14 A. Correct.

15 Q. So you have done a rig layout of a pad that has two  
16 producing wells on it, and you have not shared it with the  
17 company that's operating the wells?

18 A. Correct. Now I can say --

19 Q. There is no question. You can be asked on redirect if you  
20 want.

21 THE COURT: Your attorney will have an opportunity.

22 THE WITNESS: Thank you.

23 BY ATTORNEY BRIER:

24 Q. So if the four Epsilon corporate entities have a total of  
25 nine employees and you want to go on-site and drill and

## CLANTON - CROSS

1 frack -- drill and complete these four wells in ten days, you  
2 would have to go out and engage contractors to do that,  
3 wouldn't you?

4 A. That's correct.

5 Q. Have you engaged any, as we sit here?

6 A. Yes.

7 Q. Who have you engaged?

8 A. We have engaged consultants personnel.

9 Q. But they don't drill and complete wells, do they?

10 A. They help perform the duties of drill and completing a  
11 well.

12 Q. Have you engaged a contractor to go on the pad and drill  
13 and complete the four proposed wells?

14 A. No.

15 Q. No?

16 A. No, we have not.

17 Q. Certainly, the nine employees of Epsilon aren't going to do  
18 it. Right?

19 A. That's not their role. No, sir.

20 Q. And you've known since December 22 that you had an  
21 anticipated spud date of April 22. Right?

22 A (Witness nodded in the affirmative.)

23 Q. You have a road maintenance agreement with Rush Township?

24 A. We have not engaged Rush Township yet for a road  
25 maintenance agreement.

## CLANTON - CROSS

1 Q. You know one is required to perform these operations, don't  
2 you?

3 A. Yes, we do.

4 Q. And so that the Court understands the relevance of a road  
5 maintenance agreement; there is so much heavy traffic going to  
6 this construction site that the township requires the operator  
7 to sign a contract before you can bring that heavy equipment in  
8 so that the contractor shares responsibility for maintaining  
9 the public roads. Correct?

10 A. That's correct.

11 Q. And it's May 12 and you want to start operations on May 22,  
12 and you haven't gone to Rush Township to get a road maintenance  
13 agreement. Correct?

14 A. That's correct.

15 Q. Do you have any idea how many tractor-trailers would be  
16 accessing this site if you were permitted to drill and complete  
17 these wells on a daily basis?

18 A. I could give an estimate.

19 Q. What's your estimate?

20 A. Well, for instance, the mobilization of the rig would  
21 probably be a 30-load rig, a 30-truckload rig.

22 Q. Thirty tractor-trailers. Right?

23 A. Yes. Um-hmm.

24 Q. Just to get the rig on-site?

25 A. Um-hmm.

## CLANTON - CROSS

1 Q. How about the sand?

2 A. The completion site?

3 Q. Right.

4 A. It would be probably substantially more, obviously.

5 Q. Hundreds of tractor-trailers. Right?

6 A. Could be.

7 ATTORNEY BRIER: I'm going to go back to Plaintiff's  
8 exhibits. Judge, this is in Plaintiff's exhibit binder. And I  
9 want to start with Plaintiff's Exhibit 16.

10 Could you please put that on the screen? If you can  
11 enlarge it so we can read the coordinates. Thank you.

12 BY ATTORNEY BRIER:

13 Q. Do you remember seeing this exhibit yesterday?

14 A. I do.

15 Q. And this exhibit purports to show the Wyalusing Creek water  
16 withdrawal point in the Wyalusing Creek. That's where the red  
17 drop-pin is. Right?

18 A. Yes.

19 Q. And it was your testimony under oath that that -- those  
20 coordinates are the same coordinates of the 2008 Turm Oil  
21 permit that Epsilon acquired through its contractor, Turm Oil.  
22 Right?

23 A. My testimony was that the information provided to us about  
24 the coordinates came from the SRBC, and yes, they showed those  
25 to be the same coordinates.

## CLANTON - CROSS

1 Q. Do you recall, sir, being shown Plaintiff's Exhibit 23,  
2 which is the SRBC docket number 20110607?

3 A. Yes.

4 Q. And this is the one when you were testifying, you directed  
5 the Court's attention to the chart at that top of page three of  
6 this that shows the constituent parts of the gallonage that is  
7 permitted under this docket. And you made the point that .216  
8 million gallons a day was sourced to the Turm Oil docket and  
9 .499 was sourced to Chesapeake's 2009 docket. Correct?

10 A. Correct.

11 Q. And that creates a total authorization on page one of .715  
12 million gallons a day. Correct?

13 A. That is correct.

14 Q. Now, this document that you testified to about yesterday  
15 aggregates those two volume totals into a new total itself has  
16 withdrawal -- I'm sorry -- on page two has withdrawal location  
17 coordinates, doesn't it?

18 A. It does.

19 Q. And if you would, compare the ones on that to the ones on  
20 the screen that are at the drop-pin at the Wyalusing Creek.

21 A. Okay.

22 Q. They're different, aren't they?

23 A. They are.

24 Q. And you didn't put a drop-pin where these coordinate are on  
25 your exhibit, did you?

## CLANTON - CROSS

1 A. We did not.

2 Q. So if you would, take a look at Exhibit 24 with me. And  
3 you were asked about this yesterday. This is the 20121209  
4 docket. Correct?

5 A. Correct.

6 ATTORNEY BRIER: And Mary, could you put the second  
7 paragraph on the screen, please? If you can enlarge that,  
8 please.

9 BY ATTORNEY BRIER:

10 Q. The record will reflect, sir, that when you were asked  
11 about this yesterday, your Counsel directed your attention to  
12 the language in the second paragraph that ends with a reference  
13 to Commission docket 20081227. Do you remember that?

14 A. I do.

15 Q. Are you weren't shown the next sentence, were you?

16 A. I was not.

17 Q. Why don't you read it for the Court? Read it out loud.

18 A. Yes. "This renewal incorporates a combination -- the  
19 quantity combined in Commission docket number 20110607 and  
20 authorizes a project to operate at a location previously  
21 reviewed and approved under Commission docket number 20090610."

22 Q. Who obtained Commission docket 20090610?

23 A. Chesapeake Appalachia.

24 Q. So when you were testifying yesterday, you weren't shown  
25 that sentence, were you?

## CLANTON - CROSS

1 A. I was not.

2 Q. And when it says this renewal, it's talking about the 2012  
3 renewal, isn't it?

4 A. Yes.

5 Q. And doesn't that expressly state that it authorizes the  
6 project to operate at the location previously reviewed and  
7 approved under Commission docket 20090610?

8 A. It authorizes that to be both permits.

9 Q. The withdrawal point is at the site that Chesapeake's  
10 original water surface withdrawal point was at. Correct?

11 A. Ask the question again.

12 Q. The current withdrawal point in the Wyalusing Creek for the  
13 .715 million gallons a day isn't at the Turm Oil original  
14 surface water withdrawal point; it's at the Chesapeake surface  
15 water withdrawal point that was approved in the 20090610  
16 docket. Correct?

17 A. My understanding of the coordinates comes from the SRBC.  
18 And the coordinates provided to us by the SRBC are consistent  
19 with coordinates on docket number 20121209 and had been renewed  
20 into docket 2017.

21 Q. Right. That's my point. The 2012 docket was renewed into  
22 2017, and that withdrawal point goes back to the Chesapeake  
23 withdraw point.

24 A. My understanding that the coordinate provided to us by the  
25 SRBC in the e-mail exchange we had showing our docket number



## CLANTON - CROSS

1 lists the same coordinates as the current docket.

2 Q. I'm not going to belabor it, but I want to make sure the  
3 record is clear for the Court.

4 This 2012 document states that it's a renewal that  
5 incorporates the combined quantity contained in the Commission  
6 docket number 20110607 and authorizes the project to operate at  
7 the location previously reviewed and approved under Commission  
8 docket number 20090610.

9 That 20090610 is the Chesapeake docket and surface  
10 withdrawal point, isn't it?

11 A. Yes.

12 Q. I want to speak to you about irreparable harm, sir. Your  
13 Counsel, towards the end of your testimony yesterday, asked you  
14 to explain to the Court Epsilon's position as to why it would  
15 be irreparably harmed if the Court denies the request.

16 And you identified two justifications for irreparable  
17 harm. The first justification was that in the Auburn gas  
18 gathering system, as volumes fall, the gas gathering rate  
19 charged for the production of the gas increases. Correct?

20 A. The gathering and transportation fees increased, yes.

21 Q. The cost of service model?

22 A. It's described as a cost of service model, yes. Correct.

23 Q. And your point that you want the Court to appreciate is  
24 that if you don't bring on new production, the existing wells,  
25 the production eventually falls off, and the effect of that on

## CLANTON - CROSS

1 Epsilon and the other working interest parties is that the  
2 gathering rate charged by Williams increases for the same  
3 volume of gas?

4 A. It's, in effect, how it works.

5 Q. And you know that gathering rate. If I asked you to look  
6 up the gathering rate you paid Williams for the Auburn gas  
7 gathering system in any month in the last 18 months, you could  
8 look it up, can't you?

9 A. We could.

10 Q. So it's a known charge, the invoice you forwarded. Right?

11 A. Yes.

12 Q. And therefore, if there was some finding that Chesapeake  
13 had not complied with your view of the JOAs, and the gathering  
14 rate number needed to be calculated as to how it increased,  
15 it's a simple math calculation; volume times the gathering rate  
16 will give you the basis for determining whether the charge is  
17 increased. Correct?

18 A. That's not correct. The determination of the gathering  
19 rate which you are applying to that volume is tied to  
20 throughput in Auburn which includes historical throughput and  
21 forecasted projected throughput.

22 Q. Right. And then you do a look-back calculation.

23 A. Right. So you can take your produced volume and apply it  
24 to the gathering and transportation fee you are describing to  
25 calculate. But we cannot estimate what the gathering and

## CLANTON - CROSS

1 transportation rate is going to be if we don't meet the  
2 objectives of the development and continue to grow throughput  
3 in Auburn.

4 Q. Does Epsilon market its own gas?

5 A. We do.

6 Q. Can you agree that gathering and transportation are two  
7 very different charges? Correct?

8 A. Yes.

9 Q. Williams doesn't transport, Williams gathers.

10 A. Right.

11 Q. The gathering rate is knowable. Correct?

12 A. Yes, the current gathering rate is knowable. The future  
13 gathering rate is not.

14 Q. Well, of course. The current rate. Right?

15 A. The current rate is knowable, yes.

16 Q. You know a lot about this, don't you? Isn't Epsilon a  
17 35-percent interest owner in the Williams/Auburn gas gathering  
18 system?

19 A. We do own an interest in the gathering system, yes.

20 Q. So you are on both sides; you want to produce as part of a  
21 joint operating agreement with Chesapeake, Equinor and others,  
22 you want to be a producer to put gas into the gathering system.  
23 Correct?

24 A. Yes.

25 Q. And then you want to be on the gathering side as a

## CLANTON - CROSS

1 35-percent owner of the Williams gathering system, and you  
2 benefit from that; you get revenue from that, don't you?

3 A. We do.

4 Q. In fact, in your 10(k), you get almost as much revenue from  
5 the gathering system in Auburn as you do from your gas  
6 production in Auburn, don't you?

7 A. We do.

8 Q. You did not tell the Court that yesterday, did you?

9 A. I was not asked that question.

10 Q. So that the Court understands; if wells are produced on the  
11 Craige pad and that increases the volume put into the Williams  
12 gathering system that you own a third of -- right?

13 A. Yes.

14 Q. -- and that has the effect of changing the gathering rate  
15 charged by Williams, that benefits all of the joint  
16 common-interest parties, including Chesapeake and Equinor,  
17 doesn't it?

18 A. Yes.

19 Q. So your interests are aligned in that sense. You are not  
20 arguing that Chesapeake wants to see Equinor pay higher gas  
21 gathering rates, are you?

22 A. I have not made that argument, no.

23 Q. Yeah. I didn't think you would. But to be clear, if  
24 production is increased in the gas gathering system that you  
25 own up there, you'll get more revenue from that, too.

## CLANTON - CROSS

1 A. We will.

2 Q. And the gathering system does more than gather. It  
3 processes, doesn't it?

4 A. It does.

5 Q. It dehydrates. Correct?

6 A. Correct.

7 Q. And Williams charges for that?

8 A. There is a fee for that, yes.

9 Q. So the higher the volume, the more revenue generated by  
10 Epsilon as a one-third owner of --

11 A. Yes. There's costs and offset, as well. But yes, revenue  
12 increases.

13 Q. Yeah, but you're not in business to incur costs; you are in  
14 the business to make money.

15 A. Agreed.

16 Q. You only do it because as the volume increases, you make  
17 more money. Correct?

18 A. Right.

19 Q. We touched earlier on the argument that there's a concern  
20 about not being able to quantify the drainage that might occur  
21 if you're not able to develop the Craige South proposal that  
22 that you are asking the Court to approve.

23 A. Yes.

24 Q. And we touched on that because you sold land to Cabot and  
25 that land is right next to that proposed well. Right?

## CLANTON - CROSS

1 A. Yes.

2 Q. Now, Chesapeake -- I'm sorry. Epsilon has petroleum  
3 consultants that are experts in valuing proved gas reserves,  
4 don't they?

5 A. We engage reservoir engineers, yes, to participate in our  
6 reserve evaluation.

7 Q. Do you know of a company by the name DeGolyer and  
8 MacNaughton?

9 A. DeGolyer and MacNaughton?

10 Q. Thank you.

11 A. Yes.

12 Q. And they do work for Epsilon, don't they?

13 A. They do.

14 Q. And they study and evaluate your proved reserves, don't  
15 they?

16 A. They do.

17 Q. And yesterday you said that it was possible that there  
18 could be drainage from the offsetting wellbore on the Cabot  
19 land if sold. But as you sit here, you can't tell this Court  
20 there is drainage, can you?

21 A. I cannot.

22 Q. And you haven't amended your publicly-filed reports that  
23 value your proved reserves because of the drainage, have you?

24 A. We have not.

25 Q. And those go out to *Wall Street*; people rely on that.

## CLANTON - REDIRECT

1 A. Agreed.

2 Q. Just one final subject area. Is it correct that what  
3 you're asking this Court to do is to order that Epsilon be  
4 permitted to develop the four proposed wells in a very short --  
5 start that in a very short time period, and that if the Court  
6 did that, it would be the first time in the history of Epsilon  
7 that in the marcellus shale formation, it went onto a well pad  
8 where another company has operating wells and performed very,  
9 very dangerous drilling and completion operation?

10 Isn't that true?

11 A. That is true.

12 ATTORNEY BRIER: Nothing further.

13 THE COURT: All right. Redirect, Attorney Madriz?

14 ATTORNEY MADRIZ: Yes, Your Honor. Brief redirect.

15 THE COURT: Yes.

16 REDIRECT EXAMINATION

17 BY ATTORNEY MADRIZ:

18 Q. Good morning, Mr. Clanton.

19 A. Good morning.

20 Q. I would like to direct your attention to Plaintiff's  
21 Exhibit 1, page 11, just because Counsel was talking to you a  
22 little bit about the JOA and the deadlines and how it impacted  
23 the commencement date. Do you recall that?

24 A. I do.

25 Q. If Epsilon gets boots-on-the-ground by May 22nd, is it

## CLANTON - REDIRECT

1 Epsilon's position that Epsilon has commenced operations under  
2 its well proposal?

3 A. It is.

4 Q. If Epsilon has commenced operations by May 22nd, can  
5 Epsilon engage with consultants, rig drillers, Rush Township to  
6 get the wells drilled if Chesapeake cooperates with Epsilon?

7 A. It can.

8 Q. I want you to take a look at the first three lines of page  
9 11 of Plaintiff's Exhibit Number 1.

10 Can you highlight and blow those up please, Mary?

11 Thank you.

12 A. Okay.

13 Q. I want to go through each piece to get Epsilon's position  
14 to extend the proposals from April 22nd to May 22nd, if that's  
15 okay with you. Okay.

16 It reads, "If 100 percent subscription to the proposed  
17 operation is obtained" -- are the four new proposed wells the  
18 proposed operation?

19 A. Yes.

20 Q. And you testified that 100 percent subscription was  
21 obtained by Epsilon. Correct?

22 A. That's correct.

23 Q. So back to the sentence. -- "the proposing party"-- Who  
24 is the proposing party that is being referred to here?

25 A. Epsilon.



## CLANTON - REDIRECT

1 Q. -- "shall promptly notify the consenting parties of their  
2 proportionate interest in the operation." Was Chesapeake a  
3 consenting party to the four proposed wells?

4 A. They were not.

5 Q. So does Epsilon have any obligation, in your mind, to  
6 provide any further notice to Chesapeake?

7 A. We don't believe they require notice.

8 Q. -- "and the parties serving as operator" -- who is the  
9 operator? Who would be the parties serving as operator here?

10 A. One of the consenting parties, which is us, Epsilon.

11 Q. -- "shall commence such operation within the period  
12 provided in Article VI.B.1, subject to the same extension  
13 rights as provided therein."

14 Did I read that correctly?

15 A. You did.

16 Q. I am going to now direct your attention to page ten, lines  
17 seven through ten.

18 Can you blow that up and highlight it, please, Mary?

19 Can you see those lines, sir?

20 A. I can.

21 Q. Are these the lines in the JOA that Epsilon relied on for  
22 extending -- for the same extension rights as provided therein  
23 as quoted in the previous language we just reviewed?

24 A. It is.

25 Q. Okay. Thank you. I want to turn your attention now to

## CLANTON - REDIRECT

1 Plaintiff's Exhibit Number 45.

2 Can you pull up the second e-mail, please? Thank you,  
3 Mary.

4 Do you recall Chesapeake's Counsel asking you  
5 questions about your e-mail dated October 15th, 2020 at 2:50  
6 p.m. to Ms. Woodard?

7 A. I do.

8 Q. In that e-mail one of the statements that you made was that  
9 you do not make any reference to Article VI.2.

10 A. I do.

11 ATTORNEY MADRIZ: Can you highlight the portion of the  
12 second sentence right after, from two all the way through to  
13 parties?

14 THE WITNESS: I'm sorry. Repeat the question.

15 ATTORNEY MADRIZ: I'm asking Mary to highlight certain  
16 language for you.

17 BY ATTORNEY MADRIZ:

18 Q. Do you see that?

19 A. Yes.

20 Q. And so again, Chesapeake's Counsel made a statement that  
21 you made no mention to Article VI.2. Do you recall that?

22 A. I do.

23 Q. I want you -- can you read that language right there?

24 A. "Operations by less than all parties. Two, operations by  
25 less than all parties."

## CLANTON - REDIRECT

1           ATTORNEY MADRIZ: Mary, can we now go back to  
2 Plaintiff's Exhibit 1 on page ten and focus on section two?  
3 Can you highlight section two and the caption, as well?

4 BY ATTORNEY MADRIZ:

5 Q. Is this caption the same exact caption that's included in  
6 the e-mail that we just reviewed in Plaintiff's Exhibit 45?

7 A. That was my intent, yes.

8 Q. Did you reference this section in your e-mail?

9 A. Technically I did.

10 Q. And what section is this?

11 A. This is operations by less than all parties.

12 Q. And what actual section is this in the JOA?

13 A. This is section two.

14 Q. I also wanted to briefly talk about some of the statements  
15 that were made while Chesapeake's Counsel was talking about  
16 Epsilon's ability to re-propose and reset the clock. Do you  
17 remember that discussion?

18 A. I do.

19 Q. Essentially opposing Counsel was trying to make the point  
20 that if for some reason this Court did not issue the temporary  
21 injunction that Epsilon could simply just re-propose and reset  
22 the clock. Correct? Do you remember that discussion?

23 A. I do.

24           ATTORNEY BRIER: Objection, Your Honor. I know  
25 there's no jury here and there's a lot of latitude, but I think

## CLANTON - REDIRECT

1 that is not an appropriate way of framing a question. If he  
2 has a question, he should ask the witness a question and not  
3 lead him to it. I think it's inappropriate.

4 THE COURT: So in your question you characterized  
5 Counsel's question on cross. I'm going to overrule the  
6 objection. Be careful about your characterization. It was a  
7 little less than clear. Why don't you rephrase? Although I'm  
8 overruling the objection, you can ask questions about questions  
9 asked on cross.

10 ATTORNEY MADRIZ: Sure. Not a problem.

11 BY ATTORNEY MADRIZ:

12 Q. So I want to talk about the discussion you had with  
13 opposing Counsel about re-proposing and resetting the clock. I  
14 want to get a little bit more clarity about in the event this  
15 Court does not issue a temporary injunction, if Epsilon can  
16 simply just reset the clock and re-propose.

17 A. Okay.

18 Q. If Epsilon fails to meet the commencement date, and in the  
19 interim before it re-proposes the same four wells, Chesapeake  
20 or another JOA party proposes a well that conflicts with one of  
21 Epsilon's proposed wells, how does that impact Epsilon's  
22 ability to propose the well that is now in conflict with the  
23 Chesapeake proposed well?

24 A. It could prevent us from developing that well.

25 Q. So going back to the question. Can -- is there -- what is

## CLANTON - REDIRECT

1 your understanding as to whether Epsilon can have certainty  
2 that if it fails to meet the commencement date that it can  
3 simply re-propose the wells and start the clock for each of  
4 those four proposed wells?

5 A. There is not certainty that if we re-proposed the four  
6 wells that they would be re-proposed under the same criteria,  
7 and no other circumstances had arisen between then and  
8 re-proposal.

9 Q. Chesapeake's Counsel was also asking you a series of  
10 questions about information that Epsilon had gathered, but I  
11 think the discussion was that it was not shared. Do you recall  
12 that line of discussion?

13 A. I do.

14 Q. Why was that information not shared?

15 A. They are a non-consenting party.

16 Q. What has stopped Epsilon from moving forward and doing  
17 everything that was included in that statute that was shown to  
18 you during the discussion, your discussion with Chesapeake's  
19 Counsel?

20 A. A lack of cooperation by Chesapeake.

21 Q. Go into that. Explain what you mean by that.

22 A. Because of this circumstance, because Epsilon -- Chesapeake  
23 has elected not to serve as operator, and we are having to step  
24 forward and serve as operator on a pad site where there are the  
25 two existing wells and they are the operator of record, there

## CLANTON - REDIRECT

1 is quite a bit of necessary exchange meant amongst the two  
2 parties.

3 And we obviously are not getting any kind of support  
4 from Chesapeake in these matters; whether they be regulatory,  
5 whether they be technical, geoscience engineering, whether they  
6 be concurrent operations on the site, whether they be safety  
7 planning, regardless, they have not cooperated with us and  
8 continue not to cooperate with us.

9 Q. Is it possible for Epsilon to comply with the statute that  
10 was statute that was shown to you without Chesapeake's  
11 cooperation?

12 A. It is not.

13 Q. What can Epsilon do to circumvent Chesapeake's refusal to  
14 cooperate with Epsilon to meet the requirements in that  
15 statute?

16 A. Repeat the question.

17 Q. Can Epsilon do anything to meet -- satisfy the statute if  
18 Chesapeake refuses to cooperate?

19 A. Until we have boots-on-the-ground and access to the site  
20 where we can define what our timing of operations are going to  
21 be, it is not possible for us to comply with all the  
22 obligations and regulations that we would be responsible to  
23 comply with, including notices.

24 Q. And can Epsilon have boots-on-the-ground if it does not  
25 have access to the grounds and if Chesapeake refuses to

## CLANTON - REDIRECT

1 continue to cooperate with --

2 A. If Chesapeake does not cooperate and prepare the existing  
3 producing wells in a manner that would allow us access to the  
4 site to conduct the drilling and completion operations that  
5 they have elected not to operate on behalf of the consenting  
6 parties, then we basically are stalled and are unable to make  
7 progress toward advancing the proposal.

8 Q. Thank you, sir.

9 I want to shift our attention really quickly about --  
10 and talk about the volume throughput and the business portion  
11 of Epsilon's -- of your discussion about Epsilon's business  
12 with Chesapeake's Counsel.

13 You testified yesterday that projected volume  
14 throughput played a key role in Epsilon's business. Do you  
15 recall that?

16 A. I do.

17 Q. How does Chesapeake's refusal to permit Epsilon to propose  
18 wells impact Epsilon's ability to make those projections?

19 A. Well, when -- as a part of this cost of this services  
20 model, the forecasted amount of volume that is included with  
21 the throughput gas that's already been processed through the  
22 gathering system, to come up with the cost of service for that  
23 particular year is hard to quantify.

24 If you can't put a forecast out there and know with  
25 clarity what the development is going to -- how many wells are

## CLANTON - REDIRECT

1 going to be drilled, how long the laterals are going to be,  
2 what the productivity of those wells is going to be going into  
3 the system and offering that up to Williams so that they can  
4 use those projections to render back the gathering and -- the  
5 cost of services for gathering that gas, it's difficult.

6 Without being able to propose wells, we can't know  
7 with certainty what the projected volumes that are going to be  
8 put into the system so that we can appropriately estimate what  
9 that cost might be.

10 Q. And what is that --

11 A. Their refusal to share with us the forward development plan  
12 of Auburn creates quite a bit of uncertainty on our behalf.

13 Q. And what does that do to Epsilon's business operations and  
14 business model?

15 A. Well, as I testified yesterday, the single largest cost  
16 component of producing these wells is the gathering, this fee  
17 that we're talking about. That fee is subject to all of our  
18 production, not just new well production.

19 So if the operator does not continue to develop the  
20 wells in accordance with the timing necessary to maintain or  
21 lower that gathering fee, then we're subject to increases and  
22 we lose profitability on an annual basis, on a quarterly basis,  
23 on a monthly basis. It's ever-present and ongoing  
24 presently.

25 Q. And this is Epsilon's property right that Epsilon is trying



## CLANTON - REDIRECT

1 to utilize. This is not some -- and Chesapeake is refusing to  
2 allow. Is this the first time that this has happened?

3 A. No.

4 Q. How does Epsilon feel about Chesapeake's refusal to allow  
5 Epsilon to do -- to try to capitalize on its property rights?

6 A. Well, we, as a part of the settlement agreement, thought we  
7 finally had recaptured our rights under the JOA to be able to,  
8 if they were not going to, propose wells and continue the  
9 development of Auburn.

10 And we're back here again being blocked and prevented  
11 from exercising our rights under the joint operating agreement  
12 to develop our minerals.

13 Q. What comfort -- given what has transpired with Chesapeake  
14 and their refusal to allow Epsilon to take full advantage of  
15 its property rights, what level of comfort does Epsilon have  
16 that this won't happen again in the future?

17 ATTORNEY BRIER: Objection, Your Honor. It's beyond  
18 cross. We did this dance yesterday. I didn't cover Epsilon's  
19 expectations about what's going to happen in the future. He  
20 had a lot of latitude, but now he's just doing something he  
21 should have done on direct if he didn't.

22 THE COURT: Mr. Madriz.

23 ATTORNEY MADRIZ: Your Honor, this goes straight into  
24 irreparable harm. One of the arguments that was being advanced  
25 was that the clock could just simply be reset and the whole

## CLANTON - RECROSS

1 process could be started. I'm trying to actually get to the  
2 fact that this is a recurring issue and there is no level of  
3 comfort that -- even assuming that there was not a conflict  
4 well that was proposed by Chesapeake that there is no guarantee  
5 that this won't happen again.

6 THE COURT: Yes, Mr. Brier.

7 ATTORNEY BRIER: Your Honor, he can argue that in  
8 closing. It's not redirect.

9 THE COURT: I'm going to overrule the objection. The  
10 question has been posed. I will allow the answer. I don't  
11 know if you need to have the question repeated for you,  
12 Mr. Clanton.

13 THE WITNESS: We are concerned that the behavior will  
14 continue; if these permits and these well proposals expire, as  
15 was done to us previously by the operator, that if we  
16 re-propose them again, we have no confidence that they will be  
17 honored then, as they are not being honored now.

18 ATTORNEY MADRIZ: Thank you. No further questions.

19 ATTORNEY BRIER: May I briefly, Judge?

20 THE COURT: You may.

21 ATTORNEY BRIER: Could we put Exhibit 45 back on the  
22 screen, please?

23 RECROSS-EXAMINATION

24 BY ATTORNEY BRIER:

25 Q. Mr. Clanton, you were just asked about Exhibit 45 and

## CLANTON - RECROSS

1 specifically the language in your e-mail of October 15, 2020.

2 Correct?

3 A. Yes.

4 Q. And the line of questioning was that your e-mail actually  
5 references Article VI.B.2. Right?

6 A. Yes.

7 Q. It doesn't reference Article VI.2. It references Article  
8 VI.B.2. Right?

9 A. Yes, the B is a typo on my part.

10 Q. I just wanted to make sure. I wasn't tricking you when I  
11 asked you the question the first time. Right?

12 A. Right.

13 Q. So it references Article VI.B.2. But more importantly, it  
14 doesn't reference the first paragraph of Article VI.2, it  
15 references the second paragraph. Right?

16 A. Yes, that was a typo on my part.

17 Q. Oh, that's another typo. Your reference to the second  
18 paragraph is a typo? You're telling this Court that's a typo?

19 A. My intention was to reference Article VI.

20 Q. But then you go on to talk about 100 percent subscription.  
21 And that's in the second paragraph of VI.2, isn't it?

22 A. It's in Article VI.

23 Q. The second paragraph.

24 A. Fine. Yes.

25 Q. What this e-mail doesn't say is we have the right under

## CLANTON - RECROSS

1 Article VI.2(a). It doesn't say that, does it?

2 A. It doesn't say you have the right to do what under VI.2(a).

3 Q. This e-mail doesn't say that Epsilon has the right to  
4 develop the wells under Article VI.2(a) in the first paragraph,  
5 does it?

6 A. We don't say it specifically right there.

7 Q. You don't say it generally either.

8 A. Earlier in the e-mail train, I set out the three examples.

9 Q. And then she asked you to identify the article, and the one  
10 you identify is the second paragraph of Article VI.B.2. Right?

11 A. Yes.

12 Q. Okay. Thank you.

13 Now, you made a comment on redirect that if Chesapeake  
14 doesn't go in and prepare the existing wells, you are not going  
15 to be able to go in and drill and complete the new wells.  
16 Right?

17 A. Yes.

18 Q. And that's a comment that I want to make sure the Court  
19 understands. When you say prepare the existing wells, there's  
20 a great deal of work that would need to be done to make those  
21 wells safe so that drilling operations could occur proximate to  
22 them, isn't there?

23 A. There is.

24 Q. They would have to be plugged. Correct?

25 A. Not plugged. They would have to be temporarily abandoned.

## CLANTON - RECROSS

1 Q. Abandoned. And equipment would need to be removed so that  
2 the big rigs could come in. Right?

3 A. Yes. The wells would have to be prepared, is probably a  
4 better way to put it, for temporary abandonment which does  
5 include some downhole plugs.

6 Q. Right.

7 A. But it's not plugged in the sense that you plug the well  
8 never to be produced again.

9 Q. And I wasn't suggesting that. I was suggesting that there  
10 are safety steps that you need to take to plug the well so that  
11 if there's a problem on the surface, you don't have a well  
12 control event.

13 A. Right. I would choose not to use the word plug, because  
14 that has a connotation that I don't want the Court to be  
15 confused with. The wells could be temporarily abandoned and  
16 then be returned to their prior temporarily-abandonment  
17 producing life.

18 So yes, they would have to be prepared for the safe  
19 operations of the drilling and completion activities that we  
20 would be conducting, but it would not damage the wells to  
21 temporarily abandon them.

22 Q. You're asking this Court, as part of the relief that you  
23 need, to order Chesapeake to do all of that, aren't you, so  
24 that you can go in and drill and complete the wells?

25 A. We are asking this Court to require your client's

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1 cooperation.

2 We're also knowledgeable and capable of what  
3 temporarily-abandonment conditions need to be met. And if  
4 Chesapeake is unwilling to do that and would want to force that  
5 obligation onto us, we can do it.

6 Q. But Chesapeake is the operator of those wells, aren't they?

7 A. Chesapeake is the operator of record, and we are not  
8 disputing that nor are we trying to supplant them.

9 Q. I don't want to belabor it. My only point is the relief  
10 you are seeking isn't simply to change the status quo that  
11 would permit you to frack -- drill and complete the four new  
12 wells. It would also require Chesapeake to do things to the  
13 existing wells it is producing?

14 A. We are asking for relief that absolutely requires  
15 Chesapeake to cooperate with us on many levels.

16 Q. Now, you made a comment in response to your Counsel's  
17 questions about this notion of lost profitability and why it's  
18 in your business interest to increase the production in Auburn,  
19 because it feeds into the gas gathering system that you own a  
20 third of. That lost profitability concept isn't something that  
21 can't be calculated. You calculate profitability all the time,  
22 don't you?

23 A. It's difficult to calculate. And I may not have done a  
24 good job explaining that. But there's a forecasting volume.  
25 That forecasted volume related to proposed development is a

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1 component of the evaluation. And we are unable to understand  
2 from Chesapeake what the forward development plan is so that we  
3 can properly estimate what that cost might be.

4 Q. Whether it's difficult or not, it's calculable?

5 A. We can't calculate it without Chesapeake's involvement and  
6 their plans for development.

7 Q. No. It's calculated by Williams. Williams calculates the  
8 gathering rate, don't they?

9 A. Williams is responsible for establishing the gathering fee,  
10 yes.

11 Q. Just one brief point on that. You're one-third owner of  
12 the Williams gathering system in Auburn. Correct?

13 A. I think we have 35 percent actually.

14 Q. Thirty-five. And you have a guaranteed rate of return of  
15 18 percent on your invested capital on that gathering system,  
16 don't you?

17 A. That's correct.

18 ATTORNEY BRIER: Okay. Thank you, Judge.

19 THE COURT: All right. Mr. Clanton, I just have a few  
20 questions. Do you still have Plaintiff's 45?

21 THE WITNESS: Yes.

22 THE COURT: All right. This exhibit, as you know, was  
23 admitted into evidence yesterday. And of course it's a 19-page  
24 long e-mail thread, primarily between you and Ms. Woodard from  
25 CHK. And as I indicated on the record yesterday, I did review

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1 the entire e-mail thread. So I just want to ask you a question  
2 about a few of the e-mails that were not asked about by  
3 Counsel, because there was some terminology I didn't understand  
4 in a few of the e-mails.

5 The first instance where I see this terminology, if  
6 you could turn to page five, there is a September 30, 2020  
7 e-mail from Ms. Woodard to you. In the second paragraph of  
8 this e-mail she refers to an offer on the Craige pad as a  
9 cash/carry option. I'll represent to you that similar  
10 terminology is used in, I think, two other e-mails.

11 Can you just explain to me what is being discussed  
12 between you and Ms. Woodard with respect to a cash/carry  
13 option?

14 THE WITNESS: Sure. Because we were talking about  
15 operatorship, and at that point it was believed by both us and  
16 represented by Julie that probably this project wouldn't be  
17 successful in capturing capital from Chesapeake because of the  
18 financial constraints that they were under during that time,  
19 and therefore, that's one of the reasons why they didn't want  
20 to dedicate human resource to this project. She -- and we  
21 discussed the potential of them operating without bringing  
22 capital to the table, participation; in other words, we would  
23 carry their interests. They could earn a reversionary interest  
24 in the well if they were to come forward and serve as operator  
25 and we take a portion of their interest.



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1           And so we were discussing at that time the potential  
2   of them serving as the project manager, continuing as operator,  
3   drilling the wells and us finding some financial alternative to  
4   their lack of capital availability for this -- or perceived  
5   lack of capital availability for this project.

6           THE COURT:   Okay.   Understood.   Thank you.

7           My next question has to do -- again, I think my  
8   question comes from a lack of understanding on my part about  
9   some of the terminology involved.   Hopefully you'll find that  
10   to be an understandable lack of understanding, given that I  
11   don't have your depth of background in this particular field.

12          The term spud is the term that was utilized in your  
13   company's proposal.   Right?

14          THE WITNESS:   Yes.

15          THE COURT:   And I thought you gave a very clear answer  
16   in the first couple of questions to Mr. Brier's cross  
17   examination about what that term means.   And I want to make  
18   sure I understand, because I think there's a little confusion  
19   on this issue.

20          So tell me again, what exactly does the word spud mean  
21   in the context of a new well drill proposal?

22          THE WITNESS:   In general, the industry accepts the  
23   word spud as the moment of which rotary drilling equipment is  
24   initiated.

25          THE COURT:   Okay.   Well, what I wrote down in response

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1 to Mr. Brier's question that it was the moment when a drill bit  
2 hits the ground, and then you added meaning a drill rig is  
3 on-site.

4 Is there a difference between those two things?

5 THE WITNESS: No. There can be two types of rigs.  
6 But you know, one common understanding is when there is rotary  
7 equipment that is tied to a rig, that spuds -- basically the  
8 drill bit is at the surface and drills the first section of the  
9 hole.

10 Now, often times operators will set conductor pipe, we  
11 drill a certain amount of feet; 80, 90, 120 feet, and you don't  
12 necessarily have to have rotary equipment to do that. You can  
13 have a different kind of rig that would do that. Sometimes  
14 it's not considered spudding.

15 Spudding is typically when you have a drilling rig  
16 that is capable of drilling the surface hole.

17 THE COURT: Okay. So in order to be in the position  
18 to have the kind of equipment on-site to do the type of  
19 activity you just described, is your position then that you  
20 don't need to have that road, the township approval in order to  
21 bring that equipment in?

22 THE WITNESS: That's right.

23 THE COURT: So what type of equipment would you need  
24 to bring in in order to be in that spud --

25 THE WITNESS: It's tractor-trailer based equipment.

## CLANTON - COURT INQUIRY

1 But it's not repetitive, you know, constant use of the road.

2 THE COURT: So --

3 THE WITNESS: But those permits --

4 THE COURT: Hold on, Mr. Clanton. I don't think you  
5 let me finish my question.

6 THE WITNESS: Sorry.

7 THE COURT: My question is what kind of equipment do  
8 you need to bring in, the drilling equipment that you need to  
9 have on-site in order to be quote/unquote spud ready?

10 THE WITNESS: What kind of equipment do we need to  
11 bring in? We need to mobilize the drilling rig.

12 THE COURT: Okay. One tractor-trailer?

13 THE WITNESS: No, ma'am. That's the 30  
14 tractor-trailer loads is a good estimate of that.

15 THE COURT: Okay. And your position then is that Rush  
16 Township will not have any concern one way or another about  
17 Epsilon, through a subcontractor, bringing 30 tractor-trailers  
18 in?

19 THE WITNESS: No, that's not what I'm saying. I'm  
20 saying the spudder rig is different than the drilling rig. The  
21 drilling rig is the one that would require about 30  
22 tractor-trailer loads to mobilize the rig. And there would  
23 need to be coordination with the local authorities and the  
24 townships for the condition of the road in the road agreement.

25 THE COURT: Okay. Now, your position is that, if I

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1 understand your testimony, Epsilon -- if this Court grants  
2 injunctive relief, Epsilon is in a position to have the  
3 spudding rig on-site at the Craige well pad by May 22?

4 THE WITNESS: Our position is that we can commence  
5 operations commensurate with a joint operating agreement.  
6 There is site prep that has to be done. You have heard the  
7 cross here. There is preparatory work to be done on the  
8 existing producing wells and the pad site, and then there is  
9 additional pad site preparation work that would need to be done  
10 prior to moving in some of these other services.

11 So all of those activities can be considered  
12 commencement of operations that are not necessarily spud.

13 THE COURT: What would constitute commencement of  
14 operations for purposes of the language in the JOA?

15 THE WITNESS: It's a gray area. I think in this case  
16 our interpretation would be boots-on-the-ground. If we could  
17 get boots-on-the-ground, that would be our commencement of  
18 operations. We would need access to the site.

19 THE COURT: And you agree that that is a position or  
20 an interpretation?

21 THE WITNESS: Yes.

22 THE COURT: Okay. The document that you were shown by  
23 Defendant's Counsel that is a Pennsylvania statutory provision,  
24 and it's been marked as Defendant's 40 was --

25 It might be helpful if I could ask Defendant's Counsel

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1 to pull up Defendant's Exhibit 40. Thank you. If you can  
2 scroll down. The Court is observing that the -- I'm sorry. If  
3 you can scroll back up to A. There we go.

4 So the language seems to refer to the operator having  
5 to do certain things pursuant to the statute. Do you agree  
6 with me?

7 THE WITNESS: Yes.

8 THE COURT: Is that your understanding, as well?

9 THE WITNESS: Yes.

10 THE COURT: You indicated to me basically -- actually  
11 not basically. I wrote it down. You said it is impossible for  
12 Epsilon to complete the steps delineated in this statute at  
13 this point in time without the cooperation of Chesapeake.

14 Was that -- that was your answer to the question  
15 earlier. Do you recall testifying to that effect?

16 THE WITNESS: Yes. Um-hum.

17 THE COURT: Now, why is it impossible for Epsilon to  
18 take these steps, which basically amounts to reviewing public  
19 information and submitting a questionnaire to landowners, but  
20 it's not -- it wasn't impossible for Epsilon to submit well  
21 proposals to DEP in December of 2020? Explain that to me.

22 THE WITNESS: Yes, Your Honor. What I was trying to do  
23 was item D in this, not item A but item D, which sets out that  
24 the Department has at least 30 days prior to drilling. We  
25 can't commit to the 30 days prior to drilling because we can't

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1 access the pad site.

2 THE COURT: It says at least 30 days prior to  
3 drilling. Right?

4 THE WITNESS: Right. At this point it's still unclear  
5 as to when we're going to be able to drill.

6 THE COURT: Your testimony is that it's impossible,  
7 and you used the word impossible, for Epsilon to submit this  
8 report and to send out the questionnaires to landowners because  
9 you don't know what date you could drill.

10 THE WITNESS: And we don't know if we are going to  
11 successfully prevail, to be honest with you. We don't want to  
12 send out questionnaires to people if we're not actually going  
13 to be commencing operations. It's unclear.

14 We would feel more comfortable with resolution to the  
15 matter before we started making public notices.

16 THE COURT: Understood. Only one more question from  
17 the Court. It was the last point that you were examined on by  
18 Mr. Brier. And that has to do with the difficulty of  
19 calculating essentially lost profitability. All right.

20 And I understood your answer to be that it is a very  
21 difficult figure to calculate, maybe under the best of  
22 circumstances, but particularly under the circumstance where  
23 there is information uniquely within the possession of  
24 Chesapeake that would be needed for Williams to calculate a  
25 future rate. Did I understand you correctly?

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1 THE WITNESS: You got it.

2 THE COURT: Okay. And so I think you agreed with  
3 Mr. Brier that the lost profitability figure is calculable if  
4 you have the full universe of information. Did I understand  
5 that correctly?

6 THE WITNESS: That is correct.

7 THE COURT: All right. And so for example, through  
8 litigation and discovery, information could be requested from  
9 Chesapeake through a formal mechanism, though it hasn't been  
10 produced, obviously, informally. Would you agree?

11 THE WITNESS: I do.

12 THE COURT: An expert would be required, whether it be  
13 an economist, or maybe some other more specific field of  
14 expertise, could calculate the lost profitability figure if the  
15 full universe of information is obtained through litigation.

16 Would you agree?

17 THE WITNESS: I agree.

18 THE COURT: Okay. The Court has no further questions.

19 I'll start with you, Mr. Madriz; do you wish to follow  
20 up to any extent on the Court's questions?

21 ATTORNEY MADRIZ: Could we have one minute?

22 THE COURT: Certainly.

23 (pause.)

24 ATTORNEY MADRIZ: No questions, Your Honor.

25 THE COURT: Okay. Thank you. Then Mr. Brier.

## CLANTON - RE-RE CROSS

1 ATTORNEY BRIER: Just briefly, Judge.

2 THE COURT: Okay.

3 RE-RE CROSS-EXAMINATION

4 BY ATTORNEY BRIER:

5 Q. This hesitance to notify the landowners until you had  
6 certainty; you had to notify the landowners when you submitted  
7 the well proposals, didn't you?

8 A. We submitted well proposals to the parties.

9 Q. I'm sorry. When you applied for the permits. I misspoke.  
10 Let me re-ask the question.

11 A. Yes, we filed with the DEP, but we have not sent out to the  
12 general public, per se.

13 Q. I'm not talking about the general public. I'm talking  
14 about the people in the affected area in the units that you are  
15 attempting to drill in. You had to give notice to them when  
16 you applied to DEP for the permits. Correct?

17 A. I'm not sure I understand your question. Yes, we sent well  
18 proposals to the partners.

19 Q. Let's start over. I'm not talking about well proposals.

20 A. Okay.

21 Q. DEP permits.

22 A. Yes.

23 Q. When you applied for those in 2020, you were required to  
24 give notice to the affected landowners of your interest in  
25 spudding and drilling those wells. Correct?



1 A. Yes.

2 ATTORNEY BRIER: Thank you.

3 THE COURT: All right. Mr. Clanton, I think you  
4 thought I would never say this, but I believe we have concluded  
5 our questioning of you. You are excused.

6 THE WITNESS: Thank you.

7 THE COURT: At least from the witness stand. You are  
8 welcome to remain with us in the courtroom, if you wish.

9 Thank you, Mr. Clanton.

10 (Witness excused.)

11 All right. Plaintiff's Counsel, are you prepared to  
12 proceed by way of stipulation to obviate the need to call the  
13 third witness, or have you had adequate time to resolve that  
14 issue?

15 ATTORNEY THOMAS: I believe we still need some time to  
16 resolve the issue. We just sent a draft to Defense Counsel.

17 ATTORNEY BLANK: That's correct, Your Honor. We are  
18 reviewing it now, if we could have a few minutes to try and  
19 through it.

20 THE COURT: Wonderful. I think this is a great time  
21 for us to take our morning recess. Can you just give me a  
22 timeframe of how much time do you need? I would normally take  
23 a 15-minute recess at this point. Do you think that's  
24 adequate?

25 ATTORNEY BLANK: Yes.

1           THE COURT: All right. The Court will be in recess  
2 until 11:00. You can notify Ms. Edleblute or Mr. Thomas if you  
3 need additional time. Court is in recess.

4           THE COURTROOM DEPUTY: Please rise.

5           (A recess was taken from 10:50 to 11:15 a.m.)

6           THE COURT: All right. Plaintiff's Counsel and  
7 Defense Counsel, I understand, have agreed to a stipulation in  
8 writing and possibly an additional stipulation. Who will be  
9 presenting the stipulation on behalf of Plaintiff?

10          ATTORNEY THOMAS: I will, Your Honor. We have reached  
11 a stipulation on what would have been Mr. Lane's testimony. So  
12 we have agreed to the stipulation of testimony that would have  
13 been given by Mr. Lane Bond, and we have that stipulation  
14 signed by both parties to proffer to the Court. We also, based  
15 on the stipulation, move for admission of Plaintiff's Exhibit  
16 36 through 44.

17          THE COURT: All right. And do you have a copy -- a  
18 signed copy of the stipulation that you would like to tender to  
19 the Court?

20          ATTORNEY THOMAS: Yes, Your Honor. May I do so now?

21          THE COURT: Thank you. All right. The parties'  
22 stipulation with respect to the testimony of Mr. Bond is  
23 admitted and will be made part of the record.

24          Does the stipulation also address the admission of  
25 Exhibits 36 through 44, or would you like to, at this point,

1 move the admission of the exhibits?

2 ATTORNEY THOMAS: Your Honor, at this point we would  
3 like to move for the admission of those exhibits.

4 THE COURT: Is there any objection to the admission of  
5 Plaintiff's Exhibits 36 through, you said, 44?

6 ATTORNEY THOMAS: Yes, Your Honor, that is correct.

7 ATTORNEY DEMPSEY: No objection, Judge.

8 THE COURT: All right. Plaintiff's 36 through 44 are  
9 admitted. All right. Ms. Thomas, is there any other  
10 stipulations that the parties would like to present?

11 ATTORNEY THOMAS: No, Your Honor.

12 THE COURT: Okay. Thank you.

13 And Plaintiff's Counsel, is there any other evidence  
14 to present on behalf of Plaintiff?

15 ATTORNEY KROCK: Yes, Your Honor. We would like to  
16 move for the admission of four documents, four additional  
17 exhibits. The first one, Your Honor, is the transcript of the  
18 settlement proceedings from the prior lawsuit. It was filed of  
19 record in the case at, I guess, ECF docket number 37.

20 It was filed under seal. We did not bring copies of  
21 it today, Your Honor. We thought there was a possibility that  
22 if we put it in the record that it might not be sealed.

23 It wasn't clear to us whether Your Honor was going to  
24 put any of these on the docket, which is why we don't have  
25 them. We could certainly obtain them. Or since it's filed as

1 docket number 37, we think that everyone is apprised of what it  
2 is and we may not even need to circulate copies.

3 THE COURT: I'm certainly aware of the transcript,  
4 having reviewed it in connection with one of the earlier-filed  
5 motions. It is part of the record. It is filed under seal. I  
6 think maybe the cleanest thing would be if you simply want to  
7 request that we incorporate that document as an exhibit for  
8 purposes of this proceeding, and then I'll ask if there is any  
9 objection to that incorporation.

10 ATTORNEY KROCK: Certainly, Your Honor. We ask that  
11 the Court incorporate the transcript that's been marked as ECF  
12 number 37 into the record as evidence, as if it were presented  
13 here as an exhibit.

14 THE COURT: All right. Any objection to that?

15 ATTORNEY BRIER: Respectfully, Your Honor, there is.  
16 Exhibit 7 has an integration clause, paragraph 17, that says,  
17 "This agreement is the complete agreement between the parties  
18 regarding the lawsuit and may be modified or amended only by a  
19 writing signed by all parties."

20 This is the settlement agreement. I don't believe  
21 it's -- I haven't looked -- I don't believe it's appropriate to  
22 just offer a transcript of another proceeding to the Court when  
23 there's a settlement agreement that sets forth within the four  
24 corners of the instrument what the parties agreed to with very  
25 competent counsel.

1           We have all had the experience many, many times  
2     appearing before a court when parties reach an agreement in  
3     principle and parties make representations to the court that  
4     are then refined and further developed in a written settlement  
5     agreement. So I don't think it's appropriate.

6           THE COURT: Let me turn back to Mr. Krock. What is  
7     the purpose for which you offer the settlement agreement  
8     transcript?

9           ATTORNEY KROCK: I guess it would be twofold, Your  
10    Honor. I mean, certainly what was represented to the Court,  
11    which we believe to be consistent with the written settlement  
12    agreement, so we're not trying to contradict or challenge  
13    anything. So that does, on one hand, reflect what the terms of  
14    the settlement was.

15           But there's a second purpose. And the purpose was  
16    that we're establishing not just that this is what the parties  
17    agreed to but that it was presented in open court and at that  
18    time that there was a representation not just made to us but to  
19    the Court, and if there was anything inaccurate -- and quite  
20    frankly, the interpretation they are now trying to make.

21           They had the opportunity if there was clarification or  
22    anything needed. They will have the opportunity to address  
23    that or clarify it if, in fact, there was something that needed  
24    to be clarified.

25           So I think it was twofold, Your Honor. It's not just

1     what the settlement agreement was; it's the overall  
2     circumstances under which how it was negotiated and conveyed,  
3     because we think that has separate, independent value.

4             THE COURT:   Mr. Brier, I don't think we need to  
5     belabor the point.   I will accept what was previously submitted  
6     to the Court and is currently filed under seal at doc 37 and  
7     incorporate that into this case.   It is part of the record in  
8     this case, and the weight and relevance of it can be argued by  
9     Counsel at a later point today.

10            ATTORNEY BRIER:   I appreciate that.   I don't even have  
11     it.   It wasn't provided to us.   I wasn't told this was going to  
12     be asked for.

13            THE COURT:   Okay.   In as much as the Court is now in  
14     the business of printing copies of everything for both parties,  
15     I will ask Ms. Edleblute -- I assume Plaintiff's Counsel  
16     doesn't need a copy of the transcript.

17            ATTORNEY KROCK:   That's correct, Your Honor.   We do  
18     not.

19            THE COURT:   I will ask Ms. Edleblute to print one copy  
20     for Defense Counsel.   If memory serves, the transcript, in its  
21     entirety, is about eight pages.   The Court's recollection of  
22     the transcript is that it reflects, in very typical fashion,  
23     that all of the parties came in and represented to Judge  
24     Mannion that, in fact, this was their agreement and they were  
25     all voluntarily agreeing to the terms.   And that's it.   It's

1 very short. We will print it and we will give you a copy, Mr.  
2 Brier.

3 ATTORNEY KROCK: The second document, Your Honor,  
4 unfortunately, I hate to ask that another document be printed,  
5 but it's another one that I don't have copies of right now.  
6 And quite frankly, it is something that we didn't expect we  
7 would need until today. We were hopeful we could work a  
8 stipulation out but we couldn't.

9 We believe it's appropriate to move into evidence a  
10 copy of the form model JOA for this particular year that was  
11 used as the model. We didn't anticipate needing to use that.  
12 It came to -- I guess we realized that even the Court had asked  
13 questions about a particular section that is referenced in the  
14 Craige JOA and pointed out that that number doesn't appear to  
15 exist in our JOA.

16 I think it's a very easy explanation to make; that  
17 when the parties modified the JOA, they cut out a subsection  
18 (a) in Article VI and they actually cut out the header. When  
19 (a) got cut out, the header of (b) got eliminated. So now  
20 there is no (B) next to the heading title but afterwards  
21 there's a (c).

22 So when you read the JOAs, it was just bad cutting and  
23 pasting when it was put together. So all we wanted to do was  
24 just reach a stipulation with Counsel to just establish that is  
25 section (b) right there that started with the form model (a),

1 but when the parties cut and paste, the (b) fell out and there  
2 was no stipulation reached on that.

3 Seeing as the Court had inquired about it, we thought  
4 it might be appropriate just for that limited purpose of  
5 showing that that was the subsection (b).

6 THE COURT: Mr. Brier.

7 ATTORNEY BRIER: Your Honor, I hate to be difficult  
8 but I do object. Again, an 11th hour request that I don't  
9 have. The JOAs that are at issue are in evidence. And the  
10 JOAs that are at issue have, on the last page, page 30, the  
11 last words above the signature lines are, "No changes,  
12 alterations or modifications have been made other than those  
13 made by strike-through and/or insertion that are clearly  
14 recognizable as changes."

15 My distinguished colleague wasn't there in 2010 when  
16 these were signed. He doesn't know what was done and what was  
17 cut and pasted and what judgment was made. We weren't there.  
18 There wasn't a witness in this courtroom that was there. And  
19 to now introduce some model instrument so that they can make  
20 argument about what the intent was when revisions were made is  
21 hugely prejudicial. That's -- the Court has the evidence.

22 ATTORNEY KROCK: Your Honor, we'll withdraw the  
23 request. The reality is is that every party, including the  
24 correspondence of all of the parties that have referred to that  
25 as section VI.B throughout at some point in time, so we just



1 thought with inquiries of the Court, we thought it might be  
2 easier to stipulate and get something in that I don't think  
3 anybody factually disputes.

4 THE COURT: The request having been withdrawn, we will  
5 move on to the next exhibit. You said you had four. We have  
6 admitted one. One is down and we have two.

7 ATTORNEY KROCK: What I would consider to be the third  
8 one is actually a series of exhibits. These are the briefs  
9 that I referenced in our opening statement, where we have got  
10 four briefs in different courts, and we can either show them or  
11 read, you know, the docket numbers.

12 These are four briefs that Chesapeake Appalachia, LLC  
13 filed in federal court that are available on the electronic  
14 docket, and there is no dispute about their authenticity. In  
15 all of these briefs, Chesapeake Appalachia, LLC sought  
16 injunctive relief when their rights to property interest was  
17 denied and they needed access.

18 We're admitting for the purpose of establishing that  
19 when there are property interests, particularly in the gas and  
20 oil industry, when access is denied that Chesapeake took the  
21 same position we are taking in this case and argued that it was  
22 indisputable that the denial of access causes irreparable harm  
23 and cited to the very same authority we do.

24 THE COURT: Mr. Brier.

25 ATTORNEY BRIER: Your Honor, I don't know what he's

1 talking about. I don't know what cases he's talking about.  
2 He's asking to move into evidence things he hasn't given me.

3 This is not an efficient way of doing this. If he  
4 wants to argue that, he can argue it in a brief and give it to  
5 the Court. You don't just stipulate it into evidence and say  
6 some party is here acting in a way inconsistent with its prior  
7 conduct.

8 This Court has a record before it. We were very, very  
9 diligent in trying to make a record for it. What was argued in  
10 some other cases where we don't have the underlying pleadings  
11 and we don't know what the testimony was, I don't get the point  
12 of it. He can make the argument that Chesapeake is acting  
13 inconsistently. You don't move those pleadings -- those briefs  
14 that he hasn't given me into evidence.

15 ATTORNEY KROCK: Your Honor, I'm offering them into  
16 evidence. This is a self-authenticating document that I'm  
17 prepared to offer into evidence. We didn't conduct injunction  
18 discovery in this case. I didn't have all of the exhibits and  
19 the evidence that they came with and are moving into evidence  
20 during this hearing.

21 This is no different. This is a document that we  
22 obtained that is available. It's self-authenticating. And we  
23 are offering it for the purpose, and it's just a limited  
24 purpose, of what they asserted in here. They can't -- it's the  
25 other way around. If they want to argue, once we have admitted

1 this into evidence, and make arguments about somehow why this  
2 is different and it's distinguishable, they can make those  
3 arguments. But I don't need to establish any of those. I just  
4 need to establish that they made the arguments in these cases.

5 And I think it's admissible evidence, Your Honor.

6 ATTORNEY BRIER: Your Honor, it's a case within a case  
7 within a case within a case within a case. It's like a  
8 Russian, whatever they call it?

9 THE COURT: The nesting doll.

10 ATTORNEY BRIER: Nesting doll. We're here on the  
11 facts in this case.

12 THE COURT: I understand, Mr. Brier. I understand the  
13 very limited purposes for which Mr. Krock moves to have these  
14 briefs moved into evidence. It's essentially to support his  
15 argument already made in his opening statement that Chesapeake  
16 has taken an inconsistent position in this case vis-a-vis other  
17 cases previously litigated.

18 To the extent that those briefs are relevant, it would  
19 seem to the Court to hinge on the similarity in the prior  
20 cases, which the Court may or may not be able to ascertain from  
21 the brief.

22 So I will admit them into evidence for the limited  
23 purpose identified by Mr. Krock. We will label them to be  
24 clear about it, and then I need to receive those into evidence.  
25 But again, we need to have copies provided for opposing --

1           ATTORNEY KROCK: Those ones we do have copies of,  
2 Your Honor.

3           THE COURT: Wonderful.

4           ATTORNEY BRIER: It would have been nice to have  
5 gotten them earlier.

6           THE COURT: Mr. Brier, I know that this has been an  
7 extraordinary undertaking. Let's remain --

8           ATTORNEY BRIER: I apologize.

9           THE COURT: -- civil with each other. Actually, I  
10 want to give a shout-out to my staff. I think my staff has  
11 been extraordinarily helpful, and we're happy to help, and I  
12 understand everybody is working under extraordinary time  
13 circumstances.

14           But do me a favor, while we're being helpful, let's  
15 all be nice to each other.

16           ATTORNEY BRIER: I understand your ruling and I  
17 respect it. Just for record, I should have added the argument  
18 rule of completeness, that you pick one brief out of a file. I  
19 understand the Court's ruling. I just wanted to see it.

20           THE COURT: Very well. Ms. Edleblute is going to  
21 provide a copy of doc 37 to Defense Counsel. For the record,  
22 that document has been provided.

23           Mr. Krock, I think we are up to Plaintiff's 47, I  
24 believe.

25           ATTORNEY KROCK: So we would be starting at 47 or this

1 would be 48?

2 THE COURT: Bear with me for one moment. So your next  
3 exhibit number that has not been utilized is Plaintiff's 47.  
4 So I believe these four briefs would be -- would you be marking  
5 them as Plaintiff's Exhibits 47, 48, 49 and 50?

6 ATTORNEY KROCK: Yes.

7 THE COURT: Okay.

8 ATTORNEY KROCK: Would you like me to read the caption  
9 for each one, or did you just want me to provide them?

10 THE COURT: I have admitted them, and now you can just  
11 tender them to the Court. Actually, I'll tell you what, we  
12 should identify for the record by some means what is P-47,  
13 P-48, et cetera. So if you could just give some identifying  
14 information about what each document is.

15 ATTORNEY BRIER: Can I have a copy?

16 ATTORNEY KROCK: Yes.

17 Plaintiff's Exhibit 47 is a memorandum in support of  
18 law of a motion for temporary restraining order and preliminary  
19 and permanent injunction. The caption is Chesapeake  
20 Appalachia, LLC versus Robert C. and Mary S. McRoberts, et al.  
21 This was filed in the United States District Court for the  
22 Western District of Pennsylvania.

23 The next exhibit would be 48. That caption of  
24 Plaintiff's Exhibit 48 is Chesapeake Appalachia, LLC versus  
25 Eugene Frye, F-R-Y-E. Memorandum in support of Plaintiff's

1 motion for preliminary injunction. That was filed in the  
2 United States District Court for the Southern District of West  
3 Virginia.

4 Plaintiff's Exhibit 49 is Chesapeake Appalachia, LLC  
5 versus Chris Cole, C-O-L-E, and Jamie Cole. The document is  
6 entitled memorandum in support of motion for preliminary  
7 injunction. It was filed in the United States District Court  
8 for the Middle District of Pennsylvania.

9 And the final exhibit, Exhibit 50, has a caption of  
10 Chesapeake Appalachia, LLC versus Kevin Williams. The document  
11 is titled motion for preliminary injunction. It was filed in  
12 the United States District Court for The Eastern District of  
13 Kentucky.

14 THE COURT: All right. Are there any other -- thank  
15 you. Please give those to Ms. Edleblute. Thank you.

16 THE COURTROOM DEPUTY: Sure.

17 ATTORNEY KROCK: Your Honor, the last series of  
18 exhibits that we move for admission into evidence are the two  
19 expert reports that we had attached to our -- the previous  
20 reply brief. One was the expert report of Dorsey Roach. The  
21 second was the expert report of Bruce Kramer.

22 We do not, obviously, have copies of those. I think  
23 we understood that that was going to be addressed and the Court  
24 was aware that was going to be addressed at the hearing.

25 THE COURT: Mr. Brier.

1           ATTORNEY KRAVITZ: Your Honor, I'm going to argue  
2 this. Your Honor, on May 6th when Epsilon filed its reply  
3 brief to its preliminary injunction, it notified everybody for  
4 the first time that they retained two experts. We moved to  
5 strike that on May 7th.

6           The Court quickly accommodated all the parties and  
7 heard argument on that. The Court provided Epsilon with a very  
8 clear choice; either they could proceed yesterday and today  
9 without experts or they could proceed the end of July with  
10 experts. Unhappy with that decision, they moved to reconsider,  
11 and they improperly asserted before the Court the actual  
12 pretrial expert reports of their two experts and told the Court  
13 that their experts are not going to be available to come into  
14 this hearing.

15           Your Honor did not fall for that trick. Your Honor  
16 confirmed for all the parties yesterday that the Court did not,  
17 in fact, read those reports. And they're here today and now  
18 they want to put them into evidence.

19           The issue is they are hearsay and they are  
20 inadmissible. The experts are not available to be  
21 cross-examined on their reliability or the authenticity of  
22 their reports and the opinions contained therein.

23           In Epsilon's brief they make a statement. And I am  
24 quoting from page seven of ECF 65. "Expert reports completely  
25 inadmissible at trial may be allowed for a preliminary

1       injunction."

2               They provide the Court with two case citations,  
3       neither of which stand for that proposition.

4               The first case, Engelund, admits an affidavit in a  
5       preliminary injunction hearing. We don't dispute that.  
6       There's been affidavits admitted into evidence over the last  
7       two days.

8               The last case is from the Fifth Circuit, and it  
9       equally does not admit the pretrial expert report without an  
10      expert being available to testify at a preliminary injunction  
11      hearing.

12              The prejudice that was argued to this Court last week  
13      is even more applicable today. It's compounded. Chesapeake  
14      doesn't have an expert. We just became aware there were  
15      experts. We have no ability to challenge these experts. And I  
16      would represent to the Court -- and I understand the Court did  
17      not read the opinions contained in those pretrial reports.

18              But what they are attempting to do is usurp the sole  
19      province of this Court to interpret a contract as a matter of  
20      law. And what they are trying to do is create an ambiguity  
21      where they admit one does not exist, and we agree with that.

22              It's wholly improper. And even though we're here on a  
23      preliminary injunction and there's been argument that the Rules  
24      of Evidence are relaxed, what really has occurred here, Your  
25      Honor, is a hearing on the merits. This is a trial on the



1 merits.

2 They have a self-imposed deadline of May 22, which is  
3 ten days from now, and they are going to try to argue to this  
4 Court in closing argument that they are likely to succeed on a  
5 declaratory judgment count. We will argue they are not. This  
6 is, in essence, under Rule 57 a speedy hearing under the merits  
7 of a declaratory judgment count. It is a trial.

8 And the pretrial report from an expert in the Middle  
9 District of Pennsylvania is inadmissible at trial where the  
10 expert witness is not available to be cross-examined. And that  
11 case is Transcontinental Gas Pipeline Company, LLC versus  
12 Permanent Easement for 2.59 Acres, and the cite is 2019 Westlaw  
13 5622455. That's in the Middle District of Pennsylvania. There  
14 was a pretrial expert report offered into evidence. There was  
15 a motion in limine to preclude that report because the author  
16 of it was not available for cross-examination, Your Honor. It  
17 was ruled inadmissible.

18 And considering the extreme time pressures that we're  
19 under here and the hearing that we just had on the merits, we  
20 would ask for them to be not entered into evidence.

21 THE COURT: All right. Thank you.

22 Mr. Krock, your response.

23 ATTORNEY KROCK: Your Honor, I think there are three  
24 issues that I would like to address that pertain to the expert  
25 reports. The first issue is were we under a duty to disclose.

1 If we would have brought those experts in today without ever  
2 telling anyone, did we do anything wrong? Had we violated any  
3 of the rules?

4 I know we talked about this earlier, and I hope the  
5 Court indulges me, because you do remember that we filed our  
6 reply brief, I guess, on a Friday afternoon at, I think, 2:30.  
7 I'm sorry. They filed their motion addressing the expert about  
8 2:30 on a Friday and we had an oral argument with Your Honor,  
9 and there was a ruling within about two hours. So we had very  
10 limited time to make an argument as to why our experts should  
11 be able to walk in the door today. And we didn't even have any  
12 opportune -- or obligation to disclose them earlier.

13 In our motion for reconsideration that's what we  
14 pointed out. Your Honor asked a very important question that  
15 said, was there any obligation for us to disclose the existence  
16 of the experts for an injunction hearing or a pretrial hearing.  
17 And Your Honor asked Counsel, do you have any authority that  
18 suggests that we did anything wrong, we had an obligation to  
19 disclose that? And Counsel admitted no, they didn't have any  
20 legal authority.

21 And my question now is but do they have this legal  
22 authority that we found within 24 hours that said that there's  
23 legal authority that actually affirmatively states we didn't  
24 have an obligation to disclose that.

25 So the reality is, as far as surprise, I think that

1 the mere fact that we could have asked the experts to testify;  
2 we could have marched them through the door, and their  
3 testimony would be admissible.

4 I think it is now undisputed. It's in one of their  
5 briefs they said we're not arguing it's Rule 26, those cases  
6 don't apply because Rule 26 didn't apply. Well, if it's not  
7 Rule 26, what rule was it that obligated us to disclose the  
8 identity of these experts? There is no rule.

9 At the end of the day we got punished. We got  
10 punished for failing to disclose something that we had no  
11 obligation to disclose. We are prejudiced because our experts  
12 aren't here today. We don't want to submit their reports. We  
13 wanted to have them here with their reports. We wanted to  
14 submit into evidence their testimony. We can't, through no  
15 fault of our own.

16 THE COURT: Well, to be clear, Mr. Krock, I made a  
17 ruling with respect to presenting any expert opinion testimony  
18 at this hearing. My ruling was not based on Rule 26. I agree.  
19 I found, in fact, that you did not have a duty to disclose. My  
20 ruling was based on fundamental fairness. My ruling is what it  
21 is.

22 I have denied your request to reconsider. And I don't  
23 take your argument in the spirit of an attempt to again  
24 reconsider. However, I think we need to move -- I agree with  
25 you actually that the hearsay problem is a function of a motion

1 filed by Defense Counsel, which was granted by the Court.

2 You were precluded on Friday from having your experts  
3 travel here, and then you indicated to the Court that it was  
4 too late for them to change their travel plans even if the  
5 Court had desired to reconsider.

6 ATTORNEY KROCK: Right.

7 THE COURT: Let's move forward to another issue now,  
8 because there is also an objection to the substance of these  
9 reports, which the Court has not reviewed. And so for what  
10 purpose are you offering each of these expert reports? Let's  
11 turn to that.

12 ATTORNEY KROCK: Right. And we'll take them one at a  
13 time. You know, Mr. Roach is a -- he is an expert land  
14 professional. His expertise is that he's intimately familiar  
15 with the joint -- the model form JOAs, what they're intended to  
16 do, what the purpose of the various provisions are. He sat on  
17 the committee that actually drafted the model form that is at  
18 issue in this case, the 1989 model form.

19 So he's here to provide background information about  
20 what the model form was intended to do. It's very relevant to  
21 this case, Your Honor. He's not saying exactly what the  
22 parties' agreement says.

23 But in a great example, Your Honor, there's a big  
24 dispute about that first sentence in Article VI.2(b). I'm  
25 sorry. It's (a). It's the one about hey, what was the

1 original purpose of that sentence. And our argument is that  
2 the original purpose of that sentence was to put a time limit  
3 on the activities. That's our interpretation. Not of what  
4 these parties intended but what the model form was intended;  
5 what the people in the industry understand and intend that  
6 sentence to mean.

7 That's very relevant to our argument. It's not him  
8 telling what these parties intended. He's saying what was that  
9 sentence intended to mean in the abstract in the model form,  
10 and it would help Your Honor to know that in deciding what was  
11 the intent of these parties when they modified the model form.

12 THE COURT: All right. I think I can probably  
13 shortcut this is a little bit. Based on the Court's research,  
14 the Sunbeam Corp. case from the Supreme Court of Pennsylvania  
15 in a 2001 decision holds that the parol evidence rule, or the  
16 bar on extrinsic evidence absent ambiguity in the contract,  
17 does not apply in its ordinary strictness where the existence  
18 of a custom or usage to explain the meaning of the words in a  
19 writing is concerned.

20 I understand your argument to be, Mr. Krock, that at  
21 least with respect to Mr. Roach's expert report, you are  
22 tendering this report as some evidence of industry custom or  
23 trade usage with respect to the language that appeared in the  
24 model agreement and was carried forward into the parties' JOAs.

25 ATTORNEY KROCK: Absolutely, Your Honor.

1           THE COURT: The Third Circuit in General Refractories  
2     Company versus First State Insurance Company, 855 F.3d, 152  
3     quoted approvingly from the Sunbeam decision.

4           So, for the limited purpose of providing evidence on  
5     industry custom or trade usage, I will admit Mr. Roach's report  
6     over Defense Counsel's objection, taking note of Defense  
7     Counsel's objection, and the Court will afford whatever weight  
8     it believes Mr. Roach's opinion deserves.

9           Let's turn to the other report.

10          ATTORNEY KROCK: Mr. Kramer is also being offered for  
11     industry custom and practice. Mr. Kramer is different in that  
12     he is a licensed attorney. He's a licensed attorney who is  
13     very well known and respected in the oil and gas industry. A  
14     lot of people are saying if he's an attorney, isn't he telling  
15     the Court how to decide.

16          The answer is no. Mr. Kramer has testified countless  
17     times, too many to count probably, in court about industry  
18     custom and practice as far as the same concept of how terms are  
19     utilized in a JOA. But his are not from a land professional's  
20     perspective of how the JOAs were formed and the like. His is  
21     more on an attorney perspective of that he's got experience in  
22     how would you modify the form JOA; if you're being asked,  
23     what's the industry custom of modifying the form JOA.

24          If one were asked to create veto power for an operator  
25     or for any other party, what would the process be to implement

1 that into the agreement. How do you change the model form and  
2 how would you not to achieve the result that Chesapeake wants  
3 this Court to conclude.

4 Mr. Kramer is not usurping your role, Your Honor.  
5 Mr. Kramer is saying with knowledge of industry custom of the  
6 terms and the practices and what is customarily understood by  
7 people with knowledge of the industry and these JOAs, how would  
8 they go about doing things from an industry custom standpoint  
9 to achieve a particular desired result.

10 THE COURT: Thank you for that proffer. Let me give  
11 an opportunity for Counsel to respond, because that is  
12 materially different from the report of Mr. Roach.

13 ATTORNEY KRAVITZ: Your Honor, the expert reports,  
14 they can call them custom and usage reports, if they want to.

15 THE COURT: Well, I have admitted Mr. Roach's report  
16 so we are only talking about Professor Kramer's report.

17 ATTORNEY KRAVITZ: And I respect that, Your Honor. I  
18 just want the record to just note my objection.

19 These are extrinsic opinions, trying to establish,  
20 trying to put evidence before the Court that there is  
21 ambiguities present. They are calling it custom and usage.  
22 But that's not what it is. It's going to the ultimate issue of  
23 interpreting the contract, which is the Court's function, as  
24 the Court knows.

25 So we would not only object to the Dorsey Roach

1 opinion but also the Kramer opinion, as well. In our opinion  
2 they are not custom and usage expert opinions. And for the  
3 reasons that we said earlier, they're not here.

4 THE COURT: Mr. Krock.

5 ATTORNEY KROCK: I think we have already established  
6 sufficient case law that you don't need ambiguity for evidence  
7 of industry and custom. With all due respect, in their opening  
8 argument, Chesapeake's Counsel read an e-mail from our chief  
9 financial officer and said look at what he said, this is what  
10 he means.

11 Everybody has introduced evidence that's beyond the  
12 four corners of the document to try to explain their  
13 interpretations. So the notion that we -- that there is some  
14 ambiguity that needs to be established before we introduce  
15 expert evidence would apply equally, I would think, to fact  
16 evidence, and it's been introduced all throughout these two  
17 days, to try to explain what the parties intended. Yet, both  
18 parties still argue that our positions are the only reasonable  
19 ones.

20 The mere fact that we have both argued that our  
21 position is the only reasonable one and there is ambiguity  
22 doesn't mean that we didn't put in extrinsic evidence during  
23 the hearing.

24 ATTORNEY BRIER: Your Honor.

25 THE COURT: Mr. Brier.



1           ATTORNEY BRIER: It relates to what I argued in the  
2 opening. I certainly did that. I did that knowing that the  
3 author of the e-mail was here and would be cross-examined and  
4 this Court would have the benefit to hear that.

5           The proffer that was made is that this law professor  
6 has offered his judgment about how people in the industry would  
7 have amended JOAs, had they intended the outcome that  
8 Chesapeake argues.

9           That is not custom and usage. That's a law professor  
10 saying this is what I would expect people to do. It is very,  
11 very different from the first report that this Court let in.  
12 And you noted that initially. You said it's materially  
13 different. It is coming through the side window to say if I  
14 had done this, this is what I would have done.

15           Well, that's irrelevant. It offers nothing to the  
16 Court. And it's not custom and usage. I would respectfully  
17 ask you to preclude it.

18           THE COURT: I agree with Mr. Brier. I think the  
19 proffer made by you, Mr. Krock, is describing Professor  
20 Kramer's opinion is, importantly, materially different from  
21 your description of Mr. Roach's report. And the important  
22 distinction is exactly what Mr. Brier just highlighted; namely,  
23 I understand from your description that Professor Kramer is  
24 offering an opinion about how folks in the industry would write  
25 language in order to achieve a certain effect.

1           The Court's task in this case is to interpret the  
2 agreement that has been written as between the parties to the  
3 agreement.

4           So frankly, I fear that Professor Kramer is offering a  
5 legal conclusion with respect to an issue that is not even  
6 clear to me is before the Court. So I'm going to preclude  
7 Professor -- I'm not admitting Professor Kramer's report.

8           I have admitted Mr. Roach's report. It is in  
9 evidence. And the Court will review it, subject to the  
10 objection made by Defense Counsel, and the Court will give  
11 whatever weight the Court deems appropriate to Mr. Roach's  
12 report.

13           But the Court is not taking Mr. Kramer's report into  
14 evidence. And to the extent that it has been filed, just to be  
15 very clear, the Court does not intend to review what was filed  
16 as, I think, Exhibit B attached, which is document 65-2.

17           All right. That's the Court's ruling. Now let's move  
18 on.

19           Are there any other exhibits or any other evidence  
20 that Plaintiff's Counsel is intending to introduce?

21           ATTORNEY KROCK: No, Your Honor.

22           THE COURT: All right. So Plaintiff rests its  
23 case-in-chief?

24           ATTORNEY KROCK: It does, Your Honor.

25           THE COURT: All right. Defendant.

4                   And as a housekeeping matter, I don't think I asked  
5   the Court to accept Exhibit 40 into evidence, which is the area  
6   of review document. I apologize for that. I would ask that  
7   that be admitted.

12 THE COURT: All right. First, let me take what may be  
13 the simplest issue here. Defendant's 40, is there any  
14 objection to the admission of Defendant's Exhibit 40? That is  
15 the Pennsylvania statutory provision.

17 THE COURT: All right. Defendant's Exhibit 40 is  
18 admitted.

21 ATTORNEY BRIER: No. I will do that now.

24 ATTORNEY BLANK: Thank you.

1           Your Honor, I have not had a chance to digest it in  
2 full. I would like to be able to review it with my client  
3 before I address the Court.

4           THE COURT: Okay. I'm going to give you that  
5 opportunity. Let me just clean up one thing. I don't think --  
6 when I indicated that I'm admitting Mr. Roach's report, I don't  
7 think I put an exhibit number on that. Just to clarify for the  
8 record, why don't we label that Plaintiff's Exhibit 51. So  
9 Mr. Roach's report, which the Court already has a copy of and  
10 has printed from a previous filing, is now Plaintiff's Exhibit  
11 51 in this case, and it has been admitted.

12           Okay. Now, with respect to the proffered declaration,  
13 how much time would you like? I can take a recess to give you  
14 an opportunity to discuss that with your client. Would ten  
15 minutes be sufficient?

16           ATTORNEY BLANK: Ten minutes will be sufficient.

17           THE COURT: All right. The Court stands in recess  
18 until 12:10.

19           (A recess was taken from 11:56 a.m. to 12:10 p.m.)

20           THE COURT: All right. Attorney Blank, have you had  
21 an opportunity to come to a position with respect to the  
22 proposed affidavit?

23           ATTORNEY BLANK: Yes, Your Honor. A couple of things  
24 or a few things. One, we're not going to contest the admission  
25 of the declaration. What we would like to do is, if the Court

1 is -- if that's their last piece of evidence and they're  
2 resting, we would like an opportunity, if the Court is going to  
3 break for lunch, I would like to go back -- we may have a  
4 counter-declaration limited to this declaration that we would  
5 like to submit in response to it.

6 I would like to have the lunch break to explore that  
7 and come back to the Court. That would be the last piece of  
8 evidence that we would submit. Then I assume the Court would  
9 go to oral argument, if that's the Court's desire.

10 So that's at least the position that we would like to  
11 proceed.

12 THE COURT: Okay. That is, generally speaking,  
13 acceptable. Why don't we take care of admitting Defendant's  
14 proposed -- or Defendant's affidavit. Let's have that marked  
15 and admitted. I think if you would like to have it marked as  
16 an exhibit, which would be what Plaintiff did with their  
17 declaration, your next exhibit number, I believe, is  
18 Defendant's 42.

19 ATTORNEY BRIER: So 42?

20 THE COURT: Yes. All right.

21 Now, just as a formal matter, I understood you to say  
22 earlier, Mr. Brier, that this would be the only evidence  
23 affirmatively presented in your case-in-chief. Do you now  
24 rest?

25 ATTORNEY BRIER: We do, Judge.

1           THE COURT: Okay. And then I will turn to Plaintiff's  
2 Counsel and ask if you have any rebuttal evidence you would  
3 like to present. And I understand, Mr. Blank, that you would  
4 like to take the lunch recess in order to consider whether you  
5 would like to submit a declaration -- a counter-declaration  
6 basically?

7           ATTORNEY BLANK: Yes, Your Honor.

8           THE COURT: The only problem from the Court's  
9 perspective, is I was envisioning concluding the testimony  
10 before the lunch break in order to allow Counsel to prepare for  
11 closing arguments on the other side of the lunch break. You do  
12 throw a little bit of wrench in the works there.

13           But I'm certainly going to give you a little bit of  
14 time to do that. What I would ask is -- we're going to take a  
15 lunch recess for an hour, so we'll come back at 1:15 -- if you  
16 have a declaration that you wish to submit, then we'll address  
17 that. If Defense Counsel needs any additional time in order to  
18 complete their preparations of their closing argument, we'll  
19 take an additional recess at this point.

20           It may be that you elect not to submit a declaration,  
21 and it may be that Defense Counsel feels that no additional  
22 time is needed. Is that sufficient time? I'm saying 1:15.  
23 Again, I just want to make sure that we conclude this today.  
24 If there's a request for a longer lunch break, I'll entertain  
25 it.

1           ATTORNEY BLANK: Judge, if I may, if we could take the  
2 hour and a half. Part of it is getting in and out with  
3 security, and getting back to and from was a little tight  
4 yesterday. It will help us get through. If we get it through,  
5 I will present it to them before we come back here so they have  
6 an opportunity to look at it, as well.

7           THE COURT: That's fine. Any objection, Mr. Brier?

8           ATTORNEY BRIER: No. I was going to say the exact  
9 same thing in terms of that might give them the extra time to  
10 let us look at it so we're not sitting here seeing it for the  
11 first time in front of the Court.

12          THE COURT: All right. The Court will stand in recess  
13 until 1:45. Let's go off the record for a minute.

14                   (Off-the-record discussion.)

15          (Whereupon, a luncheon recess was taken from 12:15 to  
16 1:50 p.m.)

17          THE COURT: Good afternoon, everyone. Before we  
18 recessed for lunch, I had admitted the declaration of Scott  
19 Glenn as Defendant's Exhibit 42.

20                I know that Plaintiff's team was planning to utilize  
21 the lunch recess to determine -- among other things, to  
22 determine whether an additional declaration would be admitted.

23                Have you come to a conclusion on that?

24          ATTORNEY MADRIZ: Yes, Your Honor. We would like to  
25 admit the declaration of Paul Atwood.

1 THE COURT: Is there any objection to that?

2 ATTORNEY BRIER: There is not, Your Honor.

3 THE COURT: Okay. Let's mark that as Plaintiff's 52.  
4 All right. Plaintiff's 52 is admitted. It is the declaration  
5 of Paul Atwood.

6 Is there any other rebuttal evidence to be submitted  
7 by Plaintiff?

8 ATTORNEY MADRIZ: No, Your Honor.

9 THE COURT: All right. Thank you.

10 With the evidence in this case concluded, we will turn  
11 to closing arguments. Just thinking off the top of my head, we  
12 proceed with Defendant -- no, Plaintiff first.

13 ATTORNEY BRIER: I think Plaintiffs.

14 ATTORNEY KROCK: We're happy to go first, Your Honor.

15 THE COURT: All right. Happy to hear from you.

16 ATTORNEY KROCK: Your Honor, the primary issue  
17 involved in this entire proceeding involves the right to serve  
18 as an operator if Chesapeake declines to participate in the  
19 well proposal and to serve as the operator. The other issues  
20 are certainly important to us. They're important to us if  
21 Epsilon is permitted to proceed and serve as the operator.

22 Epsilon is going to need access to the Craige well pad  
23 so that it can commence operations by preparing the well site,  
24 shutting in the existing Craige well, just temporarily and  
25 abandoning them, and then actually spudding and drilling the



1 well. Epsilon is going to need to use the Wyalusing Creek  
2 water point to withdraw water.

3 It's going to need to store that water in the Marbaker  
4 impoundment, in a facility that is large enough to store the  
5 volumes of water that it's going to need on a short basis for  
6 hydraulics to fracture those wells. PROOF!!!

7 Epsilon is going to need Chesapeake to stop attacking  
8 the validity of a duly-issued permit to drill with the  
9 Pennsylvania DEP. And Epsilon is going to need a variety of  
10 cooperation on a day-to-day basis when it's out on that pad to  
11 work through how to make sure these operations are done  
12 efficiently and effectively.

13 But the urgency of obtaining all of those other forms  
14 of relief all turn upon the issue of whether Epsilon can serve  
15 as the operator for its wells. Your Honor, the evidence is  
16 overwhelming that Epsilon has the right to serve as the  
17 operator under the JOAs. The evidence is even more  
18 overwhelming that Epsilon has the right to serve as the  
19 operator in accordance with the terms of the settlement  
20 agreement.

21 Epsilon was outraged when it found out after the  
22 settlement agreement had been signed that Chesapeake was taking  
23 the very same position involved in the prior litigation, that  
24 they had veto power. Now that we've sat in the courtroom and  
25 heard Chesapeake's explanation as to why it thinks it still has

1 veto power after it signed that settlement agreement, we're  
2 even more -- even more outraged.

3 So I want to address first, Your Honor, the likelihood  
4 of success on the merits on the operatorship issue, since I  
5 believe it's the most critical. And I'll start with the  
6 settlement agreement. There is only one plausible reading of  
7 the settlement agreement. Only one reasonable one. Chesapeake  
8 agreed that if Epsilon proposed a new well that Epsilon could  
9 serve as the designated operator if Chesapeake elected not to  
10 do so.

11 Your Honor, the prior lawsuit involved the very same  
12 issue, the right to drill a new well on a pad that was then  
13 under the operation by Chesapeake. There were wells existing  
14 on the pad at the time. The argument was the same at the time,  
15 that Chesapeake had the right to unilaterally veto the drilling  
16 of a new well. Epsilon served a declaration that it had the  
17 right to serve as the operator and the ability to move forward  
18 and do that.

19 You heard, Your Honor, that the parties settled that  
20 matter. They settled with a framework that had two components,  
21 short term and long term. The short-term component was the  
22 parties agreed how to address the wells that had then been  
23 proposed; which of the two sides that proposed wells would be  
24 drilled in the short term. But equally important in that  
25 settlement agreement was the long term. And one component of

1 the long term was that drilling moratorium. Epsilon agreed not  
2 to propose any new wells until 2020. PROOF!!!

3 But in exchange for that moratorium, Epsilon received  
4 something back. Epsilon received paragraph 8(d). It received  
5 the acknowledgment that if this issue arose on a going forward  
6 basis that Epsilon would be able to proceed with the well in  
7 the event that Chesapeake declined to participate and to  
8 operate. PROOF!!!

9 As we expected, Chesapeake pointed to the caveat in  
10 paragraph 8(d), to the extent permitted under the JOAs. The  
11 current argument, as we understand it, is that the -- that  
12 Chesapeake's position is the JOAs only allow Chesapeake to  
13 serve as the operator for a new well, ever. So that the non --  
14 the provision about designating someone else to serve as the  
15 operator can only apply to work on the existing wells. That's  
16 their position.

17 And because of that, they point to the paragraph in  
18 the settlement agreement that said hey, all we ever agreed was  
19 if you proposed something on the existing well, then you may be  
20 able to serve as the operator and we'll cooperate. But then  
21 the entire provision has no application to new wells.

22 Your Honor, the argument is absurd for several  
23 reasons. First and foremost, if we could actually pull up  
24 Plaintiff's Exhibit 7, which is a copy of the settlement  
25 agreement. If you look at the express terms of the settlement

1 agreement, the settlement agreement consistently talks about  
2 well proposals. So if we can actually start right there. Keep  
3 it right there and look at paragraph three and paragraph four.  
4 Those paragraphs talk about Chesapeake drilling, completing and  
5 putting into production new wells. Okay. References to new  
6 wells by Chesapeake in paragraphs three and four. Those are  
7 new wells that are going to be drilled. Okay.

8 Then if you look at paragraph five, what does  
9 paragraph five say? Epsilon will not withhold consent to  
10 participate in Chesapeake's well proposals to effectuate  
11 paragraphs three and four.

12 So what does the term well proposal refer to when  
13 we're talking to Chesapeake's wells? It's talking about new  
14 wells that are being drilled. It's not talking about working  
15 on existing wells. That's the way well proposal is referred  
16 to. So if we go to the next page and we go to paragraph eight,  
17 paragraph eight is referring to now Epsilon making proposals  
18 for wells under the JOA. So when it's our proposals, that also  
19 refers to proposals for new wells. It's consistent with the  
20 language in the agreement.

21 And if there's ever any doubt about that, Your Honor,  
22 look what it says after, "Epsilon made well proposals under the  
23 JOAs", and it continues, "But they have to be compliant with  
24 conformity to spacing pattern requirements." I believe it was  
25 Mr. Raleigh who discussed spacing while he was on the stand,

1 and the need to drill wells that are far enough apart from one  
2 another, they need to be adequately spaced. So you can tell  
3 from the very first paragraph (sic) of paragraph eight that we  
4 are contemplating the dwelling of new wells.

5 Then you continue in the subparagraphs, and these  
6 subparagraphs are all under paragraph eight to address the  
7 drilling of new wells in accordance with paragraph eight. In  
8 paragraph 8(b), what do we see? "Should Chesapeake consent and  
9 confirm operatorship of a well proposed by Epsilon." We're  
10 talking about well proposals. The same with paragraph 8(c) "To  
11 the extent that a well proposal is made." We're talking about  
12 a new well. Then look at the moratorium, which is paragraph  
13 8(d), "Epsilon will not make a proposal for wells to be drilled  
14 before 2020."

15 That moratorium had nothing to do with work to be done  
16 on existing wells. That was new wells. So you can tell from  
17 that the settlement agreement itself well proposal equals new  
18 wells. Paragraph eight, we're talking about new wells.  
19 Chesapeake would have you believe that with the exception of  
20 the entire rest of the settlement agreement that 8(d) is  
21 different, that paragraph (d) does not talk about new wells,  
22 that somehow that only refers to proposals for work on the  
23 existing wells. It's completely inconsistent with the rest of  
24 the language in the four corners of the document.

25 Your Honor, secondly, that interpretation is

1 completely inconsistent with the purpose and the circumstances  
2 surrounding the settlement agreement. Epsilon's proposal for  
3 that Baltzley pad were new wells. They didn't propose any work  
4 on the existing wells. And the parties didn't dispute in that  
5 lawsuit anything about the operatorship of wells, of work that  
6 will be done on existing wells.

7           So we really believe it is somewhat absurd to suggest  
8 that rather than resolving the settlement agreement, the  
9 primary issue involved in that case, who could serve as an  
10 operator for a new well, that for some reason the parties  
11 wished to interject this paragraph that addressed an issue that  
12 was never raised in the lawsuit and was never a dispute among  
13 the parties. It just doesn't make any sense.

14           Our interpretation makes sense. We recognize that it  
15 says to the extent permitted under the JOAs. And Mr. Raleigh  
16 explained exactly why that exists. We are talking about new  
17 wells, but we don't have the right to designate a  
18 non-consenting party to serve as the operator. But there's a  
19 logical reason why you want the designated party to be a  
20 consenting party. Because if it's not the operator who already  
21 has sufficient reason to understand that they had some skin in  
22 the game, you needed to make sure that the consenting party  
23 designated as the operator had some financial incentive, was  
24 aligned with any of the other consenting parties to ensure that  
25 it was acting on their behalf.

1           Epsilon's interpretation of this paragraph is  
2 consistent with the other language in the document. Epsilon's  
3 interpretation of this paragraph is consistent with the purpose  
4 and the circumstances surrounding the settlement agreement.  
5 It's the only reasonable interpretation, Your Honor.

6           The same is true as far as the likelihood of success  
7 on the merits with respect to the joint operating agreements.  
8 If we want to look at, you know, it was Exhibit 1, which was  
9 the Craige JOA, and we focused extensively on the very caveat  
10 at the beginning of the JOA -- I think it was on page ten --  
11 that had the language in Article VI.2(a), that first sentence  
12 that we have looked at; the one that Chesapeake claims is the  
13 entire basis for their argument that unanimous consent is  
14 required to drill a new well.

15           If you look at it, one thought, Your Honor, is if  
16 someone really wanted to create a requirement of unanimous  
17 consent, it would have been a lot easier to do. Right where it  
18 says operations by less than all parties, it would have been  
19 pretty easy to insert something to say no new well shall be  
20 drilled without the unanimous consent of all parties.

21           Notwithstanding anything to the contrary here,  
22 unanimous consent is required. Something to that effect would  
23 have been very, very easy and simple if that was the intent of  
24 the parties. But again, Your Honor, looking at this first  
25 paragraph, as the witnesses have testified, the first sentence

1 of this article VI.2(a) involves a limitation. The purpose of  
2 it is to impose a time limitation. If the consenting parties  
3 don't commence the operations within 90 days, then they cannot  
4 move forward. Excluding drilling from that sentence ironically  
5 is intended to make it easier to drill wells as opposed to the  
6 non-drilling activities, not to make it harder or to prohibit  
7 it. And again, Mr. Raleigh explained to you what the logical  
8 reason is of why that distinction exists.

9           These JOAs were signed in 2010 in a geographic region  
10 where there hadn't been a significant buildup of  
11 infrastructure. And it's conceivable that depending on the  
12 location of the wells that it might be a little more  
13 challenging to commence them within 90 days. And that's the  
14 reason why there is a distinction.

15           But secondly, and we went through the paragraph in  
16 detail, Your Honor, the notion that if unanimous consent to  
17 drill a well is completely inconsistent with the rest of the  
18 language in this article, we looked at subsection (b) on page  
19 11 that is entitled relinquishment for interest of  
20 non-participation.

21           And Mr. Raleigh explained the purpose of this  
22 paragraph. The purpose is to recognize that if parties don't  
23 consent, they are not going to contribute capital, and then the  
24 consenting parties are going to need to find a way to fund the  
25 work to fill in that gap with those missing dollars. And if



1 the consenting parties put more money in, then there's a  
2 reasonable expectation that they should get paid back for that  
3 and that they should not just get their capital back but some  
4 multiple of that. That's the purpose of this paragraph.

5 So if drilling would not be able to be an undertaking,  
6 then there would never be a reason to invoke this paragraph  
7 with respect to drilling. Ever. And you would not expect to  
8 see drilling in this paragraph. Ever. We counted four  
9 separate times where this provision of the agreement refers to  
10 drilling. The most glaring one, Your Honor, is right around in  
11 the middle, I think, where it says -- it's the reference to if  
12 any well drilled, reworked, sidetracked, deepened, re-completed  
13 or plugged back, which is around line ten, it goes on to say --  
14 oh, and that's including any well drilled.

15 If it ends up being a well that is capable of  
16 producing in paying quantities, then the consenting parties are  
17 to complete and equip the well, and then they are to turn it  
18 over to the operator. And there's a parenthetical if the  
19 operator did not conduct the operation.

20 That sentence tells us two things, Your Honor.

21 Number one, we're talking about drilling a new well;  
22 and number two, that new well can be drilled by someone other  
23 than the operator. One of those designated parties is going to  
24 hand it back over to the operator so that once it's drilled, it  
25 can be maintained, just like all the other wells under the

1 JOAs.

2 Third and finally on this point, Your Honor, is just  
3 looking outside of the document; Chesapeake's own conduct is  
4 completely inconsistent with its interpretation of this portion  
5 of the JOAs. Chesapeake has drilled multiple wells without the  
6 unanimous consent of the parties. The wells were drilled  
7 recently, after the settlement agreement had been entered in  
8 2018. And Chesapeake relied on the very same article that we  
9 have looked at, the very same article that Chesapeake says we  
10 are not allowed to utilize to drill new wells because there  
11 isn't unanimous consent, but Chesapeake used those, that same  
12 provision.

13 We're not going to walk through it here, Your Honor.  
14 But I think you may recall the testimony where we had the Maris  
15 well was the letter that was sent from Chesapeake to Epsilon to  
16 advise that other people had non-consented and offering Epsilon  
17 options of hey, how are we going to pick up or carry those  
18 non-consenting parties' loss. And there's three options you  
19 have, Epsilon; one, two and three, which one would you like to  
20 select. And when you look and you compare that letter with  
21 one, two and three, that is exactly the language in Article II  
22 of the JOAs, (i), (ii), (iii). The language is lifted right  
23 out of the provision of those JOAs and put right in the letter.

24 So the easiest way to characterize it, Your Honor, is  
25 if, in fact, that Chesapeake's position was correct and there

1 was veto power, that veto power would apply to everyone, not  
2 just Chesapeake. They don't have veto power. Wells can go  
3 forward without unanimous consent.

4 I want to shift gears then, Your Honor, and move to --  
5 because I think it is very clear that the operatorship itself,  
6 we can serve as the operator. We have established the  
7 likelihood on success of the merits on the issue.

8 So the next issue is what assets can we utilize. Are  
9 we allowed to utilize the Wyalusing creek water point, are we  
10 allowed to utilize water impoundment. What about the Craige  
11 well pad? So those are the issues I think that I want to  
12 address.

13 I want to start with the Wyalusing Creek water point.  
14 I think it's the most complicated and has the most moving  
15 parts. But I want to start with a simple -- backing up and  
16 starting with a simple is just look at the settlement  
17 agreement. The settlement agreement Article 8(d) specifically  
18 says that Chesapeake will cooperate by making co-owned assets  
19 available, including water withdrawal points.

20 If there were no co-owned water withdrawal points, why  
21 would that be in the settlement agreement? And that settlement  
22 agreement didn't list all of the co-owned asset nor was it  
23 intended to. It only listed a couple of them. But it listed  
24 some of the most important ones. You have heard that the water  
25 and the availability and access to obtain and store water is

1 one of the more significant portions of drilling a new well.  
2 that's why that reference is in there.

3 Mr. Raleigh had testified that do you know how many  
4 Epsilon had any interest in, co-owned or solely owned at that  
5 time. One. Wyalusing Creek. That was it.

6 So that's the easy part, Your Honor. The mere fact  
7 that the settlement agreement references it suggests that there  
8 was a co-owned Wyalusing Creek water source. Then just to back  
9 up and look at some of the elements that came into play, Your  
10 Honor, the question becomes in the farmout agreement, that's  
11 kind of where that issue starts. Did Epsilon convey an  
12 undivided 50 percent of that docket for Wyalusing Creek to  
13 Chesapeake or not?

14 And again, I think we can look at two things. One,  
15 what does the agreement say; and two, what makes sense under  
16 the circumstances. And if you look at what the agreements say,  
17 the farmout actually says that permits are included.

18 The farmout agreement has very general language that  
19 says -- almost a catch-all language, if you will, Your Honor,  
20 says, "Any other assets that we owned that is utilized to  
21 develop the general area in Susquehanna County and the  
22 northeast county." Those are included. As far as we can tell,  
23 the only argument Chesapeake made in response that said yes,  
24 but you had a list of exhibits, you know, of different assets  
25 and you didn't specifically list Wyalusing Creek on those

1 attachments. That's true.

2 But Your Honor, the paragraph said that that was  
3 including, but not limited to, the assets that were identified  
4 on those charts. And I have worked with many a deal lawyer  
5 with our different firms, and while they do their best to list  
6 assets, particularly when you are so selling such a large group  
7 of assets, that they always include including, but not limited  
8 to. And they describe the category of asset and they may try  
9 to identify on lists or, you know, exhibits those assets. But  
10 that is never intended to be all encompassing so that if they  
11 forget something, it wasn't conveyed.

12 But then there's the common sense, Your Honor. Why in  
13 the world would Epsilon convey an undivided 50 percent interest  
14 under the farmout with the intention that if things worked out,  
15 it wasn't going to be a very active operator. Its intention  
16 was that Chesapeake become the operator. The hope was that we  
17 weren't going to be doing a lot of operating. And this was an  
18 important asset that we used to drill our eight wells before  
19 the farmout. Why would that be something that wouldn't go  
20 along with the farmout -- the other farmout assets? Why would  
21 we have retained it?

22 But Your Honor, the permit that -- the docket name,  
23 like the name on the docket was, in fact, transferred from  
24 Epsilon to Chesapeake. It was done a month or two later, after  
25 the farmout. So the timing is consistent with the notion that

1 Epsilon is not likely to be utilizing that. It's more likely  
2 that Chesapeake was going to be the party that would be  
3 utilizing the Wyalusing Creek water withdrawal. They can't be  
4 listed both on the docket. Only one person can be listed on  
5 the docket. SRBC wasn't going to allow them both.

6 So there is common sense why the docket was  
7 transferred a couple months later. And we have proven in this  
8 hearing, Your Honor, that the name on the docket is not the  
9 same as ownership of the right to take the water. Those are  
10 separate. And we prove it through two ways. Number one, we  
11 have established that through our relationship with our  
12 contractor, Turm Oil, that there was a distinction between  
13 legal ownership of the rights to take the water and whose name  
14 the docket was in.

15 To the outside world, Turm Oil is listed on that  
16 docket. They were listed as the owner. But we had a private  
17 master services agreement with them, in which they acknowledged  
18 that all of the actions they were taking were on our behalf.  
19 We were paying them. In return, any permit for similar assets  
20 that they required in their own name were really ours.

21 But secondly, Your Honor, the SRBC approval documents  
22 themselves have a condition in them. We read it into the  
23 record, and it states, "Commission approval confers no property  
24 rights upon the property sponsor." So that means that the  
25 approval document itself, the fact that the approval is granted

1 and the docket is being entered into the quote/unquote owner's  
2 name is not akin to a property right. It's not evidence of a  
3 property right.

4 So what is Chesapeake's position in this case?  
5 Exactly what the SRBC says doesn't work. It's not the way it  
6 works. Their argument is well, you transferred the docket to  
7 our name. That equals ownership. That's exactly what the SRBC  
8 doesn't work.

9 But also, one of the things that we have asked from  
10 the outset of the case, and the evidence is closed now and we  
11 never heard, was there any separate consideration paid? No.  
12 If this were a separate transaction, completely separate from  
13 the farmout, we have established in this proceeding that the  
14 SRBC docket has significant value. The right to take water is  
15 valuable.

16 If this wasn't part of the farmout, why would Epsilon  
17 have just given Chesapeake this valuable right a couple months  
18 later? We didn't get paid for it. There's been no evidence of  
19 compensation paid because there wasn't any.

20 Now, there's also been some testimony and almost a  
21 suggestion by Chesapeake that somehow the fact that the permit  
22 in which the parties owned an undivided 50 percent interest was  
23 combined and consolidated with a separate permit or docket that  
24 was associated with Chesapeake, that in some way, shape or form  
25 that extinguished our property rights. And that is simply not

1 the case. There is no question that the two separate dockets  
2 were combined into one. But why would there be a suggestion  
3 that somebody's rights extinguished, and one of the two of them  
4 actually owned the right to take the water?

5 And there was some evidence in questioning about the  
6 fact that one of the approvals referred to a docket being  
7 rescinded and superseded. But in context, that's not -- I  
8 mean, that would be expected. You've got one docket that was  
9 in Epsilon's name that referred to the withdrawal of 216,000  
10 gallons of water per day. You've got a second docket that was  
11 in Chesapeake's name that had 499,000 gallons of water per day.  
12 Once you combine them, and we have got a new third permit for  
13 715,000 gallons of water per day that can be withdrawn, you  
14 obviously have to get rid of the two prior permits.

15 Of course they have to be rescinded or superseded,  
16 because otherwise, somebody might make the argument that  
17 there's the right to withdraw over 1.4 million barrels --  
18 gallons of water per day. You can have the two stand alone  
19 separately and still have them consolidated.

20 I laugh thinking about this, Your Honor, because every  
21 time I drive through Latrobe, you know the home of Arnold  
22 Palmer -- I'm not a golf person like Mr. Brier here. But my  
23 kids loved Arnold Palmers. When they were kids, they always  
24 wanted to have Arnold Palmers. I learned that an Arnold Palmer  
25 is half iced tea, half lemonade and you put them together. So



1 if I've got a gallon of iced tea here in one glass, and I've  
2 got a gallon of lemonade in the other and I and pour the two of  
3 them together, I have combined them, I've consolidated them. I  
4 don't have iced tea anymore. I don't have lemonade anymore.  
5 I've got an Arnold Palmer. Now, I have still got two gallons  
6 of liquid. They didn't get rescinded. They still exist, but  
7 they exist now as a separate entity.

8           You know what, there's been talk about which  
9 coordinates existed for where was the water taken. Bottom  
10 line, it doesn't matter. I mean, if I made my Arnold Palmer,  
11 does it matter which glass I poured it into? If I poured the  
12 lemonade into the iced tea, does that mean the person who owned  
13 the iced tea glass owns it? If I pour it back into the other  
14 glass, does that mean one owns it and the other doesn't and  
15 they can exclude them? Of course not.

16           That's what we're talking about here, a combined  
17 docket. The other two cease to exist. What we have got here  
18 is essentially something new, and it's a something new that  
19 both parties contributed to and they have an undivided interest  
20 in it. And we're not suggesting that Epsilon has the right to  
21 exclude Chesapeake from it. But what we are suggesting is that  
22 Chesapeake doesn't have the right to exclude Epsilon from it.

23           Now, I think, Your Honor, I said that was the trickier  
24 issue. As far as the Marbaker impoundment, the Craige well pad  
25 and some of these other issues, I don't think it's really much

1 of a dispute any longer. We have submitted a stipulation, Your  
2 Honor, that replaced essentially the live testimony of  
3 Mr. Bond. I think the parties are in agreement now that there  
4 is no dispute that Epsilon paid its pro rata share of the cost  
5 of building the Craige well pad and that we own an ownership in  
6 the Craige well pad. And the same is true with the Marbaker  
7 impoundment.

8 So having paid our pro rata share of those costs and  
9 owning an interest in them, we're allowed to utilize them if we  
10 are serving as the operator under the JOAs.

11 And the final point to note, Your Honor, is more just  
12 an issue of fairness. We heard testimony that the Craige oil  
13 and gas lease that actually gave rights to minerals on the  
14 Craige property was eventually obtained by Epsilon. We had a  
15 swap with Chief and we acquired that lease, and we have a  
16 relationship with the Craige family.

17 There would not be a need to put a pad out there and  
18 do all of that development but for the assets that Epsilon  
19 contributed to the JOAs. That's exactly what Mr. Raleigh  
20 testified earlier, is you don't contribute assets to the JOAs,  
21 have them developed and enhanced, contribute to the funding and  
22 then not be able to use them.

23 So I do believe, Your Honor, we have also established  
24 a likelihood of success on the merits; not just that Epsilon  
25 can serve as the operator, but also standing in the shoes

1 temporarily for Chesapeake, we are entitled to use all of the  
2 assets that Chesapeake could have used. Those are assets that  
3 we co-owned.

4 I want to shift gears, Your Honor, and talk about  
5 irreparable harm. It is undisputed we are talking about  
6 property interest. We are talking about oil and gas property  
7 interests. I think we have introduced evidence that oil and  
8 gas wells, to develop those property interests, are unique.  
9 Each one is different. We're not talking about fungible goods  
10 or even fungible construction. They're all good. Chesapeake's  
11 actions are preventing Epsilon from moving forward to develop  
12 its unique property.

13 Under Pennsylvania law, under Third Circuit law,  
14 though, we believe that that interference in and of itself  
15 constitutes irreparable harm. Period.

16 And I know we have cited certain law in our briefs,  
17 the Minard Run case was a similar case where the inability to  
18 develop assets was deemed to be irreparable harm. And Your  
19 Honor, that's why we did want to introduce into evidence the  
20 briefs that Chesapeake has filed in the other case; not so much  
21 that it's super important as far as the unique circumstances of  
22 every case but more for the general proposition that it's  
23 pretty well known in the oil and gas industry that development  
24 is important, being able to access your assets and harness them  
25 is important. And Chesapeake makes the same argument and

1 relies on the same case law that we rely on when we're denied  
2 access to our property interests in the minerals.

3 Now, in conjunction with irreparable harm, Your Honor,  
4 there's been some suggestion that we can simply just re-propose  
5 these wells and there will never be any issue or problem with  
6 doing so. We can take our time period that exists now and just  
7 pick it up and move it out six months and plop it down and it's  
8 the same. Maybe. But there is a good likelihood that is not  
9 the case. Circumstances change between now and then.

10 As, you know, Mr. Clanton testified, what if anyone  
11 makes a competing well proposal in the interim and our proposal  
12 gets outvoted? We are never going to be able to drill those  
13 wells again, potentially.

14 But, what about -- you know, it's an assumption that  
15 capital is available, that equipment will be available down the  
16 road. There is still a lot of assumptions that that well is  
17 going to be able to get drilled. And you know what? What  
18 about the costs? Do we have to re-submit -- depending on how  
19 far down the road we are, that proposal is six, seven, eight,  
20 nine months old. Do we have an obligation to go back and rebid  
21 it, price it and figure out how it's going to work? Maybe. Is  
22 that still a viable option at that point in time? I don't  
23 know.

24 But Your Honor, there is also case law in Pennsylvania  
25 that says, The repeated -- having to bring repeated lawsuits

1 over and over to vindicate one's rights also can constitute  
2 irreparable harm; that if you are repeatedly getting shot down  
3 and frustrated as far as exercising your rights, it's not fair  
4 to make you come back every time it happens, file a lawsuit,  
5 seek damages and try to collect your damages. And the next  
6 time it happens, file a lawsuit and try to collect your  
7 damages.

8 That's what we're looking at here. This is already  
9 the second time. If we have to re-propose this well in three  
10 weeks, do we have a reasonable expectation that we are going to  
11 be able to proceed with it, that Chesapeake is going to say  
12 okay, we decline to participate but you go ahead and serve as  
13 the operator? It's going to be continuing litigation, Your  
14 Honor.

15 Then when there is irreparable harm, we did talk about  
16 the Auburn gathering system and the costs associated with that  
17 and how those could be calculated. As, I believe, Your Honor  
18 pointed out, part of the problem is we don't have perfect and  
19 complete information from Chesapeake about future plans, future  
20 development. And if we had that, that we might be able to  
21 calculate monetary damages, which is true. But that doesn't  
22 necessarily mean that there is no irreparable harm on that  
23 particular issue, that that's not a second component of  
24 irreparable harm.

25 The reason, Your Honor, is twofold. Number one, while

1 that may happen in a particular lawsuit, we don't necessarily  
2 have a right to force Chesapeake under the JOAs to give us all  
3 of the information we want. We think they should. We would  
4 like to sit and meet with them and work through them and think  
5 that it's the right thing to do in order to have a true  
6 commercial partnership in these issues; say here is what we  
7 would like to do, what would you like to do.

8 We would like to think that they'll work with us. But  
9 if they decide not to, we're not suggesting we're going to file  
10 an injunction action and march in and force them to give it to  
11 us. So what we are really talking about is more just a  
12 repeated lawsuit. In any single lawsuit maybe we might be able  
13 to calculate damages. But we're not going to be able to do  
14 that on an ongoing basis in our business. We are just going  
15 to have to keep filing repeated lawsuits and then trying to  
16 quantify the damages. That's still irreparable harm, Your  
17 Honor.

18 Finally, we did have testimony about drainage of  
19 wells. It might not apply to all of the wells that we have  
20 proposed but certainly at least one of them. You've got the  
21 serious possibility that that well, the value of the well is  
22 declining because we have a competing well out there that could  
23 be draining the gas that would be available to that Craige  
24 South well.

25 Now, some examination questions had suggested yeah,

1 well, didn't we formerly own that adjacent property and then  
2 swap it to somebody else? Yeah. Did we get paid for that?  
3 Yes. But does that mean that somehow we gave up our right to  
4 rely on drainage or we expect drainage to occur? No. We  
5 expected to be able to drill a well down in that area and drain  
6 the gas. They are not mutually exclusive, I guess is the  
7 point, Your Honor.

8 Now, that's also an example of a situation, Your  
9 Honor.

10 What is the -- how would we calculate those damages?  
11 Irreparable harm is for something that's hard to calculate.  
12 There's been some comments from Chesapeake that said geeze, you  
13 guys are just speculating. You can't even prove that this  
14 drainage occurred. That's true. I don't know that we can  
15 perfectly guarantee that it was happening.

16 Your Honor, under Pennsylvania case law with the Rule  
17 of Capture, you can search oil and gas cases where one property  
18 owner says you know what, you're draining the natural gas from  
19 beneath my property, you're converting my property. And the  
20 Courts come back and say no, under the Rule of Capture, that's  
21 not the way it works. If someone is draining lands from  
22 underneath your property, what you do is you drill your own  
23 well. That's how you address that.

24 So the fact that drainage exists and occurs, it is so  
25 common and so understood that there is an entire body of law

1 with the Rule of Capture that says the whole reason we tell you  
2 to go drain your own well is because we understand that  
3 drainage occurs and we understand it's very challenging to  
4 actually prove in any specific instance whether it has occurred  
5 and the extent that it's occurred.

6 Your Honor, I do believe that we have established a  
7 number of different elements of irreparable harm.

8 But in that regard, I do want to address a couple of  
9 issues that have come up. These are issues about the timing of  
10 the operations and the type of operations that have to occur.  
11 And I think it's -- you know, it's obvious that it's important  
12 to the case to say; number one, the proposal is expired  
13 already; and number two, can the work get done, or is the  
14 failure to get work done going to moot the necessity for an  
15 injunction in this Case.

16 So I guess the questions becomes; number one, what has  
17 to be done under the proposals; and number two, when does it  
18 have to be done.

19 I think they are separate issues. I would like to  
20 address the first, the initially what has to be done. The  
21 answer -- and I think Mr. Clanton said it. The answer is  
22 Epsilon needs to commence operations on the wells. That's what  
23 has to be done in order to keep the proposals. I should say  
24 that. If you actually read the summary that says, "Must  
25 commence operations and then continue with reasonable diligence



1 to complete them." So it's not like we can get  
2 boots-on-the-ground on the well pad and do something and then  
3 just stop and leave. Once you have commenced a well operation,  
4 you have to act with due diligence to carry out the remainder  
5 of the operation.

6 So you know, where does the timeframe come from?  
7 We're really looking at the 30-day extension. That's what has  
8 come into play is where does this -- I'm sorry. I don't want  
9 jump out, I want to keep it with the operations because the JOA  
10 clearly refers to commencing operations. But some of the  
11 questions came up and said but what about the well proposals.  
12 The well proposals themselves refer to a anticipated spud date  
13 of April 22nd, not commencing operations.

14 And the question then becomes well, did Epsilon  
15 actually amend the contract and say I'm not bound by commencing  
16 operations, now I have to do more than commencing operations.  
17 That's not good enough for my well paid. I need to go beyond  
18 that and I get all the way to spudding. That's the way the JOA  
19 works. The answer is no.

20 No. The only thing that we put in that is governing  
21 in the well proposal is when we expect or when we have to  
22 commence operations on the well. Okay. If we had to do more  
23 than that and go down the line we anticipated spudding, we  
24 didn't amend the contract to actually create a -- we'll say  
25 more work that we had to do by the day we designated.

1           I think the example to illustrate this, Your Honor, is  
2   what if the inverse had happened? If we believed that  
3   commencement of operations -- and it's a little bit difficult.  
4   Some people disagree on it. And we don't say okay, it's not  
5   just back-end operation, just sitting down in an office in  
6   Houston and mail things out, we're not trying to argue that  
7   that would be commencing operations.

8           We think a more cautious approach and a more  
9   reasonable approach is to say you have got to be on the pad.  
10   I'm not saying you have to spud the well. I'm just saying you  
11   have got to be doing a lot of things on the well, the pad, to  
12   start preparing it. That's commencement of operations.

13           What if we had put in our well proposal you know what,  
14   we only have nine employees. Let's say we were going to hire a  
15   couple of new employees and we put in our well proposal, that  
16   by May 22nd of 2021, we will have interviewed and hired two new  
17   people who were going to be involved in this project. And we  
18   satisfied it. We meant what we said in our well proposal.

19           Have we satisfied the JOA? No. We haven't commenced  
20   operations. We have the right to pick a time period for  
21   commencement of operation. That's what the JOA says, and that  
22   is what is governing in our proposal.

23           But we are not allowed to change what commencing  
24   operations is in our well proposal, either for the good or the  
25   bad? We can't try to get us more latitude. But if we did

1 something like what we did here, which is honestly hope and  
2 expect that we would be able to spud by now, if we didn't meet  
3 that, that doesn't mean our proposal expired because we didn't  
4 spud. We still just have to commence operations.

5 So I want shift gears now and focus not on what we  
6 have to do but when we have to do it. Again, there's been some  
7 discussion back and forth about this 30-day extension and how  
8 it applies. I would like to pull up -- if we can focus here on  
9 the language of Exhibit 1, which is the Craige JOA. And we are  
10 actually on Article VI.1. It's on page ten.

11 We've looked at this provision that talks about the  
12 30-day extension. But we recognize that while this is relevant  
13 and it's important, it's technically not the direct section  
14 that applies, because this is talking about a well in which  
15 there are nothing but consenting parties. That's the section  
16 of this agreement. This portion is in the section that says  
17 consent of all parties.

18 Okay. And what it says is, "However, said  
19 commencements may be extended upon written notice by operator  
20 to the other parties." Okay. Stop right there. In that  
21 circumstance, the operator would be Chesapeake and the other  
22 parties are the parties -- everyone who is getting notice is a  
23 consenting party. In this case it happened to be everyone.  
24 But other parties is referring to consenting parties, because  
25 this is a situation in which everybody has consented.

1           And then the provision goes on to address the  
2       circumstances in which this 30-day extension could be taken.  
3       And it includes things like the need to get permits and surface  
4       right issues and appropriate drilling equipment.

5           So that is where the notion of this 30-day extension  
6       applies. It emanates in a section that involves consent of all  
7       parties, and it describes how it works. Well, then if we can  
8       flip the page and we're going to say is this same concept  
9       incorporated into the drilling of a well in which somebody does  
10      withhold consent and that it is going forward without the  
11      consent of all the parties, and the answer is yes.

12          At the top of the page it says, "If 100 percent  
13      subscription to a proposed operation is obtained" -- and that  
14      means that we have got enough to -- we have carried everybody's  
15      interest and it's going to move forward. Then it says, "The  
16      proposing party" -- well, that's not Chesapeake necessarily  
17      anymore, that's Epsilon -- "shall promptly notify consenting  
18      parties." Not the non-consenting parties, the consenting  
19      parties -- "of their proportionate interests in the operation  
20      and the party serving as operator" -- which is, again, in this  
21      instance, Epsilon -- "shall commence such operations within the  
22      period provided in Article VI.B.1, subject to the same  
23      extension rights as provided therein." So that is where they  
24      are incorporating back.

25          Again, Your Honor, there is no Article VI.B.1

1 technically because the B was omitted in the provision we just  
2 looked at.

3 But Your Honor, look at the subject matter. It is  
4 talking about the same circumstance. They are talking about an  
5 extension of how long you have to commence operations after you  
6 are ready to go forward. It's the exact same time period that  
7 we just looked at, but it's in the context of when you have  
8 non-consenting parties.

9 And because we are looking at it, it is in a sentence  
10 that is talking about notice being provided, and it's from the  
11 proposing parties to the consenting parties, that why we didn't  
12 need to include non-consenting parties when we provided notice  
13 of our right to invoke that provision. That's where the  
14 language comes from, Your Honor. It is in the very same  
15 sentence about providing notice to consenting parties.

16 So, in this instance Mr. Clanton testified that he did  
17 invoke that provision. We had permitting issues. Permitting  
18 issues brought us here today, Your Honor. So I don't think  
19 there is any dispute that we have got delay in obtaining a  
20 permit and our water management plan being approved. So in  
21 this instance, all we had to do was invoke it and provide the  
22 notice to the consenting parties.

23 And Your Honor, in three of the four wells, it's just  
24 us. We are the proposing party. We don't have to provide  
25 anyone else with written notice because we are the proposing

1 party. While we disagree with a lot with Chesapeake, I doubt  
2 that they are going to say that we should have provided written  
3 notice to ourself.

4 So that really is only talking about one well. The  
5 Craige South well was the only well that we had to provide  
6 notice. And Mr. Clanton said he did. The only evidence that  
7 came into court on that issue, they said did you provide  
8 written notice. He said yes, to the consenting parties but not  
9 to the non-consenting parties. So there is nothing to refute  
10 that. It is undisputed that written notice was provided to the  
11 consenting parties in the only situation where there were  
12 consenting parties other than Epsilon.

13 That, Your Honor, is why we have established that it  
14 is reasonably likely to succeed on the merits that what we have  
15 to do is commence operations, which we can do by May 22nd if  
16 Your Honor rules in our favor, and that the May 22nd is the  
17 appropriate deadline because we satisfied the obligation, the  
18 requirement of invoking that 30-day notice.

19 Finally, Your Honor, the issue I want to address is  
20 kind of the harm to the public and the issues in that regard.  
21 As we said at the outset, that we thought that the accusations  
22 that Epsilon is not capable and qualified to perform this work  
23 safely, we're not -- it's just that, accusations. I think that  
24 we have established that in this hearing.

25 Granting this -- granting us access to do the work is

1 not going to cause harm. Harm will only occur if a mistake is  
2 made or if something problematic occurs on the well pad. And  
3 there is simply no evidence and no basis to believe that any  
4 problems will arise on the well pad. The undisputed testimony  
5 is that Epsilon utilized and will utilize the same  
6 subcontractors that are experienced in the area that most other  
7 operators use in this region, including Chesapeake.

8 But Your Honor, the evidence also came in that  
9 Epsilon's management personnel are very, very experienced.  
10 There might not be a lot of them, but they are very, very  
11 experienced. And they have had experience in these type of  
12 operations, and they are certainly capable of managing the  
13 subcontractors that they have.

14 But again, Your Honor, to establish that some of this,  
15 I think, are just accusations or subterfuge, let's look back at  
16 some of these agreements. The settlement agreement said that--  
17 well, let's say it contemplated that there would be a situation  
18 where there will be multiple operators on a well pad. If it  
19 was so very dangerous to have Epsilon come out and have two  
20 operators on the well pad, why would they have ever signed  
21 that settlement? It was just a couple years ago. We didn't  
22 have any more experience then than we do now. But Chesapeake's  
23 response says whoa, whoa, whoa, we disagree with your  
24 interpretation. We only said that you can only serve as the  
25 operator for the non-new well activities, not to drill a new

1 well.

2 Well, we disagree with them. Think about it. There's  
3 five other activities that are listed. What they're saying is  
4 it's okay to have two operators on the well pad if you are  
5 performing other activities, just not drilling.

6 Well, what are those other activities? Deepening a  
7 well. You're going deeper. You've still got to have a permit.  
8 You've still got to bring the big drilling rig on. That's  
9 still going to happen, under their argument, if we would have  
10 proposed some work on an new well -- or I'm sorry -- on an  
11 existing well, and they said okay, come on, you guys can serve  
12 as the operator, we would still be on the same well pad, we  
13 would still have the drilling rig for some of those activities;  
14 not all of them, Your Honor, but at least some of those  
15 activities we would be doing the same or similar activity that  
16 would create the alleged risk that they are relying on in this  
17 case. But they are saying in similar circumstance we can do  
18 that; we can be on the well pad.

19 So Your Honor, that -- we have certainly established  
20 that there is no significant risk of us being on the well pad  
21 operating at the same time that the existing wells are there.

22 So you know, in conclusion, Your Honor, I think the  
23 overarching thing that we have learned from these facts is that  
24 Chesapeake is not going to honor those agreements. They are  
25 just not going to. They'll find a different argument of some



1 kind, but it's going to be a new argument or a different  
2 argument to say whatever it is, we can't operate it.

3 What it comes down to is it looks like Chesapeake  
4 wants the benefit of JOAs and joint development without the  
5 corresponding tradeoff. That's what JOAs are. Everybody  
6 contributes their assets. Chesapeake is the operator. They  
7 get to perform the day-to-day operations, but they don't have  
8 any more control over which activities should be undertaken  
9 than Epsilon or any other JOA party. That's the way it works.

10 They don't like it now. They took the assets. They  
11 had no problem taking the Craige oil unit and putting their pad  
12 out there. But now what they don't want to do is allow us to  
13 participate in the decision making and move forward if they  
14 don't want to participate. They took the benefits of the  
15 settlement agreement. We drilled the -- most of the wells they  
16 wanted to drill on the short term, and we had a moratorium  
17 where we didn't propose any wells. They want to deprive us the  
18 benefit.

19 Your Honor, two lawsuits is enough. If we don't get  
20 injunctive relief, there's going to be a third and maybe more.  
21 So we implore the Court to grant the injunctive relief, allow  
22 Epsilon to get out and get on the well pad so that we can  
23 commence operation and we can move forward and take advantage  
24 of the benefit of our unique property interests.

25 Thank you, Your Honor.

1           THE COURT: Thank you, Mr. Krock.

2           On behalf of the Defendant, who will present the  
3 closing argument?

4           ATTORNEY BRIER: I will, Your Honor.

5           THE COURT: All right. Please proceed.

6           ATTORNEY BRIER: Your Honor, Epsilon's motion for  
7 preliminary injunction should be denied. The testimony and  
8 evidence that this Court has received over the last two days  
9 establishes beyond cavil that this Court is being asked to  
10 enter a mandatory injunction; a mandatory injunction that,  
11 quite candidly, evolves every time Epsilon presents an  
12 argument.

13           Candidly, if you wanted to enter an order that would  
14 address what they really want, I don't think the Court has the  
15 ability to do so, given how mandatory this injunctive relief  
16 is.

17           They want to displace Chesapeake as the operator  
18 without the other JOA parties being present. They want to  
19 require, whether you call it the plugging or the temporary  
20 stopping of the current operational wells on the Craige pad,  
21 they want to allow Epsilon to go out and -- this is quite  
22 startling -- find a contractor. They haven't even found a  
23 contractor yet who would go in and do the drilling and  
24 completing operations ten days before their deadline lapses and  
25 to have that contractor come on where there's two operating

1 wells and perform these very dangerous services. And also, to  
2 bar Chesapeake from completing or proceeding with the Koromlan  
3 well. It's mandatory in tremendous proportions.

4 We heard Mr. Clanton testify that Chesapeake would  
5 have to do certain things in order to prepare the well pad for  
6 Epsilon to come on. How could this Court possibly draft that  
7 order, directing that Chesapeake do everything that Chesapeake  
8 would need to do in order to safely transition the well pad to  
9 Epsilon. Epsilon has failed to meet the heightened standard  
10 required for the issuance of a mandatory injunction.

11 When I made my opening remarks yesterday, I directed  
12 the Court to the Bennington Food case, which again states that  
13 when a party is seeking a mandatory injunction, they, and I  
14 quote, "Must meet a higher standard of showing irreparable harm  
15 in the absence of an injunction."

16 Now, the irreparable harm argument is really an  
17 evolving argument. In the last 48 hours it has evolved as  
18 follows; "We're going to be really irreparably harmed because  
19 the volumes going into the Auburn gas gathering system are  
20 going to decline, and as a result of that, we are going to pay  
21 higher gas gathering rates." The Court heard a lot of  
22 testimony on that. We understand their interest in developing  
23 in the Auburn gas gathering system. I understand it a lot  
24 better today than I did before.

25 It explains why we're here. They want this Court to

1 direct the development because they are on both sides of the  
2 transaction. They benefit from working production as a working  
3 interest owner in these JOAs, and then they capture 35 percent  
4 of the revenue in the gathering system. The riddle has been  
5 solved, Judge. The riddle has been solved. That's why we're  
6 here.

7           So you want to talk about irreparable harm, the next  
8 argument is they are going to be irreparably harmed because of  
9 some threat of drainage of their minerals. We hear all about  
10 Chesapeake's other cases and other briefs. But let's talk  
11 about this case.

12           What have you heard in this case? You heard it from  
13 Mr. Clanton. You heard it from him. I asked him, point blank,  
14 do you have any evidence that there is drainage occurring of  
15 your mineral interests because of Cabot's offsetting well. And  
16 unlike some of his other answers where I found him quite  
17 evasive, he looked me right in the face and he said no.

18           Now today, his lawyer stands before you and uses this  
19 phrase; there's a serious possibility of drainage. What? Was  
20 he here when his witness said they have no evidence it? This  
21 Court is going to embrace that and say oh, I see that it's  
22 irreparable harm. It's something that could happen, but there  
23 is no evidence that it is happening.

24           I asked him, point blank, don't you have a petroleum  
25 engineer that evaluates your proved reserves who is able to

1 determine what those proved reserves are, and why didn't you  
2 bring that petroleum engineer to court to say there's drainage.  
3 Because there is no drainage, Judge. That's why even his  
4 Counsel can't get the words out. He says there's a serious  
5 possibility. That is so speculative. The reason they want to  
6 argue that it's irreparable is because it's not quantifiable.  
7 Well, it's not quantifiable because it's not real. If it were  
8 real, you would have seen evidence that there is drainage.

9           So the evolving irreparable harm argument, first, gas  
10 gathering rates are going to go up. Little footnote on that;  
11 the other side of their operation benefits from that, because  
12 they are in the gas gathering field. So that's number one.  
13 But as this Court said, and you were very deliberate in your  
14 decision of Mr. Clanton, isn't it true, sir, that with the  
15 authority of process of the Court in this lawsuit, you could  
16 get the type of information you would need to bring an expert  
17 in to calculate the lost profits or the lost profitably. It  
18 took a little while to get there. Mr. Clanton admitted that  
19 that's true. That's true.

20           But today in closing, it's like his lawyer wasn't in  
21 the room. His lawyer forgets that. And he says we're going to  
22 have a hard time compelling that information from Chesapeake.  
23 We would like to think they would give it to us, but I'm not  
24 sure we're going to get it.

25           Well, Judge, you couldn't have made it more clearer.

1 If this lawsuit proceeds, they can use the process of the  
2 courts to seek information from Chesapeake, put an expert on,  
3 and if it's real they will prove damages. And on the point of  
4 damages, the reason we're here on May 11 and 12, and we were  
5 not here last month, is because when they came to court the  
6 first time in March, they pled a case for damages. They pled a  
7 breach of contract case.

8 And the Court will remember on one of our first calls,  
9 I said Judge, we filed an emergency motion in the Southern  
10 District of Texas to enforce the injunction order of that  
11 bankruptcy court. They drafted their complaint and they lost a  
12 month because of that. Then they come back, having pled  
13 damages, and they say our damages are incalculable. How could  
14 we ever prove damages? The first case pled them. Then we hear  
15 that the threat of serial litigation is itself a justification  
16 for irreparable harm.

17 Now, my memory, Judge, is absolutely imperfect. I  
18 don't think they have briefed that threat of serial litigation.  
19 Serial litigation? There was a lawsuit in 2018 that was  
20 settled. And the testimony that came out about that lawsuit  
21 that is abundantly clear is that both of the executives of  
22 Epsilon sat in this court under oath and admitted that  
23 settlement agreement didn't alter, amend or modify the JOAs.

24 As this Court knows, nor could it because the absent  
25 JOA parties were not parties to the lawsuit. So whatever

1 rights Epsilon had before that paragraph eight was agreed to  
2 and whatever rights Chesapeake had as the operator under the  
3 JOAs existed without alteration after the settlement agreement.  
4 The lawsuit is not about re-litigating that case. It's about  
5 the JOAs. It's about whether Epsilon can meet this  
6 extraordinarily high standard of convincing this Court that it  
7 should grant a preliminary injunction.

8           So not only is the -- they have to prove two things,  
9 immediate and irreparable. They fail on the irreparable prong  
10 for the reasons I just said; the damages can be calculated.  
11 They don't have any evidence of drainage. This serial lawsuit  
12 issue is new. It's the second lawsuit, and I guess we want to  
13 intimidate the Court with the threat that if you don't grant  
14 the injunction, Judge, we're going to be here for another  
15 injunction. I can't stop them from coming to court. But you  
16 don't get to claim victory because you have come to back to  
17 court. You have to prove a case. You have to prove immediate  
18 and irreparable harm.

19           And you can't claim that the harm that is immediate  
20 and irreparable is drainage and then run away from it when  
21 you're confronted. And you can't claim the lost value in the  
22 Auburn gas gathering system and then admit that it's  
23 quantifiable.

24           But then there's another prong. It has to also be  
25 immediate. Mr. Clanton, in his testimony today, sat before

1 this Court and said we've had a business interest in developing  
2 the gas gathering system, a serious business interest in doing  
3 it for well over a year, back to Q-1, '20. No doubt about it.  
4 They did, they have, and they still do have that business  
5 interest because they want to make money.

6 But that doesn't satisfy -- they can't come to court  
7 in March, plead a case for damages, withdraw it, come back in  
8 April, a full year after they say they were aware of this issue  
9 and say to the Court now it is immediate. You can't create the  
10 crisis. The judicial system doesn't reward people who sit on  
11 their hand and then come to court a year later and say we,  
12 today, have an emergency.

13 On either prong, they must prove both and they fail on  
14 both.

15 We heard a concession, I think, today. Just back to  
16 that drainage issue for a second. Three of the four proposed  
17 wells run up into the acreage that Chesapeake and Epsilon  
18 control. Now, Judge, sometimes you just have to take a step  
19 back and ask yourself, why wasn't that shared yesterday? Why  
20 did I have to pull that out, if they are going to ask this  
21 Court to use its extraordinary powers and grant immediate  
22 injunctive relief. We're talking about drainage, and today  
23 it's like ho-hum, so it doesn't apply to three of the wells.

24 And it does matter that they sold the parcel to Cabot  
25 and got \$1.375 million. It does matter, because they didn't



1 tell the Court that yesterday either.

2 So when they're worried about drainage, they are  
3 creating this perception that there is these offsetting wells  
4 over which they had no input or control. What's the truth?  
5 They sold them the acreage and now they want to come to court  
6 and say that creates an emergency.

7 Mr. -- my colleague may not like the way the JOAs  
8 work, and he may not like the fact that the JOA says that if  
9 they don't meet their own deadlines in their proposal, they  
10 could re-propose. I didn't put that in the JOAs. That's what  
11 the JOA says. It goes to the issue of immediate and  
12 irreparable harm. They could reset the clock. And if they  
13 think Chesapeake reaches its obligations under the JOAs, they  
14 come to court. And this time they can do it timely to assert  
15 their rights. Our position is we are not violating the JOAs.

16 The Third Circuit in the Hope versus Warden, York  
17 County Prison case, referenced this yesterday, too, is that of  
18 a party seeking a mandatory injunction that bears a  
19 particularly heavy burden of showing likelihood of success on  
20 the merits and must show that their right to relief is  
21 indisputably clear. That's at 972 F.3d, 310. The cite is at  
22 page 320.

23 The Court has heard a lot about a highly-technical  
24 industry. Looked closely at the JOAs. I don't know how this  
25 Court could come to a conclusion that any right that Epsilon

1 claims Chesapeake is interfering with is indisputably clear.  
2 There is a vigorous debate. But their rights, as they assert  
3 them, are not indisputably clear.

4 But I said to you yesterday if you don't believe me,  
5 believe them. And I reference the October 20, 2020 e-mail of  
6 Mr. Clanton to Ms. Woodard. Remember, this is after the  
7 settlement agreement in '18. It's after the parties have  
8 disagreed over how the JOAs function. Ms. Woodard asked him  
9 what section of the JOAs are you relying on for your position.

10 And in his e-mail, one of the most remarkable  
11 typographical errors I have heard about in my 59 years, he says  
12 following our internal review, the hundreds of years of  
13 experience that he and his colleague, Mr. Raleigh, have of the  
14 relevant JOAs, we believe Article VI B(2), operations by less  
15 than all parties, second paragraph is the article in the JOA  
16 that will govern the proposals. The second paragraph. Not the  
17 first paragraph they come running to court on, VI 2(a) that has  
18 the interlineated language.

19 Not even a reference to that. And Judge, you'll have  
20 to be the judge of credibility. Does anyone in this courtroom  
21 believe that was a typographical error? And to eliminate any  
22 doubt, the language tracks the language in the second  
23 paragraph. So after he accidentally typed the second  
24 paragraph, he then tracks the language about 100 percent  
25 subscription. And their interpretation, after their studied

1 review is that the incumbent operator (CHK) would serve as the  
2 operator on behalf of the consenting party. That's October of  
3 2020. It's after the issue has been framed, there's a  
4 disagreement between the parties, there is not a hint of the  
5 theory that is anything being indisputably clear. Indisputably  
6 clear. So indisputably clear it's not referenced when  
7 Mrs. Woodard says what section of the JOAs are you relying on,  
8 and he said that his colleague was involved in the internal  
9 review and agreed to what was written.

10 So I guess he adopted the typo. Thought the typo was  
11 the right answer. Well, so did Mr. Clanton.

12 But as we move forward, there's a revisionist's  
13 argument, because they need to create an argument that they  
14 have the right to be designated operator. So they go through  
15 the JOAs and they find there's one paragraph in the JOAs where  
16 a party who is proposing to do work, our argument is work in an  
17 existing well. Because that's what the interlineated language  
18 says. Their argument is -- proposes any well, any work, has,  
19 in the first paragraph, a contractual right to be designated  
20 operator if it complies with everything else in the agreement  
21 in this paragraph.

22 So now, all the sudden they say without the second  
23 paragraph, pay no attention to what we said a couple months  
24 ago, it's the first paragraph. That's why the reading is so  
25 strained. They want to say that language, that interlineated

1 language to rework, sidetrack, deepen, re-complete or plug  
2 back, that's added to alter the time period under which things  
3 would need to be done if that's what you're doing.

4 It's surplusage, if that's what they intended. It's  
5 sole surplusage, because any -- if that language were not  
6 there, that's the exact amount of time that would apply to  
7 reworking, deepening, side tracking a well. Because it would  
8 be collided within the entire notion in any proposal --

9 So their argument -- he calls mine absurd. Absurd?  
10 That that interlineated language limits that paragraph to the  
11 type of proposal that could shift an operator. I submit to  
12 you, Your Honor, that their reading of it -- their reading of  
13 it creates an amendment that means nothing, because that's how  
14 much time applies anyway. Now he says, oh, but wait, Mr.  
15 Brier, you are mischaracterizing me. What we're saying is you  
16 have to do that work within the existing wellbore within the  
17 time framed. But if you are doing a new well, that time  
18 doesn't apply. That's how he wants you to read it.

19 Well, they amended it for the existing wellbore and  
20 and they don't provide anything about the time period that that  
21 would control a proposal on a new well. But all of that is  
22 noise, Judge, because we know what they did. On December 22,  
23 they proposed four new wells. They started the clock and they  
24 set the deadline. They start the clock on December 22, and  
25 they set the deadline at April 22. And they anticipate that

1 the spud activity will occur by April 22.

2           So I argued -- I'm sorry. I examined Mr. Clanton on  
3 whether this entire case is moot. Did their proposals expire  
4 on April 22. Yesterday, he answered his own Counsel and said  
5 yes, our proposal expired. Today he said that was a mistake.  
6 That's not what I meant under oath in this court. What I meant  
7 to say is the language in Article VI 1 that begins at line  
8 three and ends at line ten, that it is expressly conditioned on  
9 those situations where all parties to whom such notice is  
10 delivered and elect to participate, that that governs, and  
11 that's what gives them the unilateral right to extend it to 30  
12 days.

13           Your Honor, a clean way of dealing with this case is  
14 to find that their proposals expired on April 22. And that's  
15 not unfair to them. They start the clock. They set the  
16 deadline. They came to this court with the complaint they had  
17 to withdrawal, and they came back to court weeks later to cry  
18 about an emergency, the same thing that they've been claiming  
19 was an emergency last year.

20           If it was an emergency in the second, third, fourth  
21 quarter of '20, why didn't they come to court? Or is there  
22 other explanation? It wasn't an emergency last year, which is  
23 my submittal to you, Judge, and it's not an emergency today.  
24 They are just calling it one.

25           By the way, this notion that they have the unilateral

1 right to extend for 30 days if they give notice -- written  
2 notice to the other parties, Mr. Clanton said well, that should  
3 just say to the other consenting parties. He doesn't like the  
4 way that reads, so they interpret it to be other consenting  
5 parties because they admit they haven't given notice to us or  
6 to the absent JOA parties.

7 Equinor, as you know, Your Honor, is -- has a  
8 significant interest in these wells and in this acreage, and  
9 they didn't even get noticed. Epsilon now views themselves as  
10 the party who can solely extend for another 30 days and not  
11 even give written notice. There no evidence of a title issue  
12 that would warrant the extension of 30 days, even if that  
13 provision applied.

14 Your Honor asked some questions about the area of  
15 review survey. And this, I think, all falls under the big  
16 umbrella of are they ready, are they credible, can they do what  
17 they would ask you to order.

18 And what's the public interest? Well, we saw in the  
19 area of review survey, the depth regulation speaks to  
20 protecting the waters of the Commonwealth of Pennsylvania.  
21 It's not about Chesapeake. It's not about Epsilon. It's about  
22 the public. And Your Honor said to Mr. Clanton, Mr. Clanton,  
23 is it your position that Chesapeake's lack of cooperation has  
24 prevented you from sending out the questionnaires. Well, Your  
25 Honor, we didn't want to do that because we didn't want to tell

1 people what we are thinking about doing until we knew if the  
2 Court was going to let us do it.

3 Minutes later on redirect -- or recross, Mr. Clanton,  
4 haven't you already told the landowners in the affected area  
5 that you intend to do these wells. It took a little while, but  
6 again, yes, we have told the landowners. That's not credible,  
7 Judge, for him to say the reason we didn't send out the  
8 questionnaire, as required by the statute, is because we didn't  
9 want to tell people until we knew what we were doing. They  
10 didn't do it because they don't expect to operate and they are  
11 not to operate.

12 Your Honor also asked can't you look at the public  
13 record and learn this information? I think the answer was yes.  
14 Yeah, that would be available to us. But he says essentially  
15 because big, bad Chesapeake won't cooperate, we can't comply  
16 with that Pennsylvania Department of Environmental Protection  
17 regulation.

18 Those are real safety issues, Judge. There is nothing  
19 hypothetical about going onto a well pad where there is two  
20 producing wells and starting drilling and completing operations  
21 for more wells. This is really, really dangerous work.

22 That's why Mr. Clanton admitted, and I think it was my  
23 last question on cross, "Is it true, Mr. Clanton, that you have  
24 never, in the marcellus formation, gone into an existing well  
25 pad where there is producing wells and conduct a drilling and

1 completing operation in a situation where there's a tremendous  
2 danger to public safety. He said yeah, we've never done that.  
3 He wants this Court to order it, though.

4 Do you have a collision survey? Yes. Have you shared  
5 it with anybody? No. Have you done the risk assessment? Yes.  
6 Have you shared it with anybody? No. How do they expect  
7 anybody to cooperate with them if they're not sending around  
8 the material that they are obligated to create under the  
9 regulations?

10 Your Honor also asked about the road maintenance  
11 agreement. And this was in the context of Your Honor probing  
12 what does spud mean. Mr. Clanton said first well, it's when  
13 the rotary drill starts hitting the earth. Well, how do those  
14 big pieces of equipment get there. Well, they get there on  
15 trucks. Well, do you have a road maintenance agreement. No.

16 Rush Township requires a road maintenance agreement.  
17 Judge, I was at this site last week. It is very mountainous.  
18 The dirt roads are narrow. They are barely passable with two  
19 cars, and there are road maintenance agreements for a reason.  
20 These roads get destroyed by this heavy equipment. So the  
21 Township says to the operator, which is anybody who wants to  
22 conduct operation, you can't ruin our roads. You can't come in  
23 and develop this property before you first sign a road  
24 maintenance agreement.

25 Now, imagine it's May 12th. They want you to order



1 that they start this operation and they don't have a road  
2 maintenance agreement. I didn't hear them say we interfered  
3 with that. It's not a serious proposal, Judge.

4 I just want to talk briefly about boots-on-the-ground.  
5 As Your Honor notes, in the four proposals they talk about an  
6 anticipated spud date. They know there is no chance they will  
7 meet an anticipated spud date, on May 22, June 22nd, July 22nd.  
8 They are nowhere near getting on and doing that work based on  
9 what they have admitted. They don't even have a contractor.  
10 There's nine people. Three of them are here.

11 And by May 22nd, they are going to spud? And they say  
12 no, we're just going to put boots-on-the-ground. Well, that  
13 euphemism is not really helpful when you are considering the  
14 safety issue and the fact that there is two operating wells.  
15 And there is all kinds of work that would need to be done, and  
16 the Court would have to order Chesapeake to do it.

17 They don't have the people to do it. Their nine  
18 people aren't going to come in and shut in two operating wells  
19 safely so that they can complete whatever operations they call  
20 boots-on-the-ground. It would take weeks just to prepare the  
21 site, just to get the matting down and do the other preparatory  
22 work before you could do any of the work, before you could even  
23 bring a truck up there.

24 Your Honor, I want to talk briefly about the water  
25 thing, again, against the backdrop of indisputably clear. My

1 colleague introduced into evidence Plaintiff's Exhibit 16. No.  
2 I'm sorry. Plaintiff's Exhibit 14. I'm wrong. Plaintiff's  
3 Exhibit 16.

4 Let me start over so the record is clear. My  
5 colleague introduced into evidence Plaintiff's Exhibit 16.  
6 It's the aerial view of the Wyalusing Creek water withdrawal  
7 satellite photo with the red pin-drop at the SRBC coordinates.  
8 You actually heard testimony yesterday about how they believed  
9 those coordinates were the coordinates from their Turm Oil  
10 permit.

11 Recognizing that that completely fell apart in  
12 cross-examination today, my colleague stands before you and  
13 says -- I hope I quote it correctly. I think he said the  
14 coordinates don't make any difference or it doesn't matter what  
15 coordinates there are. Really? What did we spend time  
16 yesterday for introducing an exhibit that purports to put the  
17 coordinate on the map so that this Judge would believe that the  
18 current water withdrawal facility is the one from their 2008  
19 docket.

20 That's because they wanted you to believe that the  
21 water is being taken out of the Wyalusing Creek at the exact  
22 coordinate points of their 2008 docket. And when that fell  
23 apart today, hours later we hear the coordinates don't matter.

24 They do matter. And I'll explain to the Court why  
25 they matter. There is no doubt that the total gallonage

1 permitted under the 2017 docket, the 2012 docket, is a  
2 combination of the gallonage permitted under the Turm Oil water  
3 docket and Chesapeake's 2009 docket. The gallonage has been  
4 aggregated. But there's only one withdrawal site. And it's  
5 either theirs from 2008 or it's ours.

6 And the reason they say it doesn't matter is because  
7 they now know the coordinates of the current water withdrawal  
8 facility are the coordinates of our water withdrawal facility.  
9 But hoping you overlook that, they are dismissive of whether or  
10 not it's relevant after trying to prove the contrary.

11 The state of the record is clearest. The permit was  
12 transferred 100 percent to Chesapeake after the farmout  
13 agreement was signed and then registered with the SRBC at  
14 100 percent to Chesapeake at the coordinates of Chesapeake's  
15 water withdrawal site. And the 2008 permit was superseded and  
16 rescinded.

17 Now, my colleague offers an explanation that those  
18 words shouldn't -- the Court shouldn't read anything into those  
19 words. But it's the plain language of the docket. Their's was  
20 superseded and rescinded. The two were aggregated into a new  
21 docket and the water is withdrawn at the coordinates of the  
22 Chesapeake docket.

23 Another interesting point, Judge, is that this Court  
24 has gone to extraordinarily lengths to permit the parties to  
25 present this case on an extremely aggressive schedule. You

1 have conducted interim argument, including an argument on their  
2 emergency request that you order us to sign the letter for the  
3 SRBC. And you'll recall, Judge that the predicate behind that  
4 request was that they needed to get it to DEP at least 30 days  
5 before May 22 in order to allow DEP to act.

6           You know what you didn't hear a hint about in this  
7 trial? On May 12th -- if all of that was true back then, on  
8 May 12th, how is it possible, that even if this Court wanted to  
9 grant relief that it could do so in such a fashion that the  
10 DEP, now in a less than a two-week period, and it will be  
11 whenever the Court rules, would somehow come to ground on the  
12 conduct, the review that they need to do. Not a hint. Not an  
13 explanation.

14           While I wasn't on the call that Mr. Dempsey conducted  
15 with the Court on this issue, I'm familiar with the transcript  
16 and I am familiar with the Court's inquiry whether if you deny  
17 the request, would it moot the request for the injunction. I  
18 thought the answer was obtuse. But at least there was an  
19 answer.

20           Today, on May 12th, after being told they needed 30  
21 days ahead, there is no explanation of why they still have a  
22 viable plan.

23           Your Honor, in your opinion, looked at the draft  
24 letter that would go to the SRBC, according to Epsilon's  
25 request, and noted in the last sentence of, I think, the second

1 paragraph that says it will remain in force until it's  
2 terminated by either party. That was part of your logic as to  
3 whether this was indisputably clear; an indisputably clear  
4 right about who owns this.

5 If Epsilon today pulled up to the Wyalusing Creek  
6 water withdrawal facility and tried to withdraw water from that  
7 creek, they would be breaking the rules of the SRBC. And  
8 that's why Epsilon needs a commitment letter from Chesapeake.

9 You know what's interesting, Judge? An affidavit or a  
10 stipulation was presented that shows that Epsilon, as a working  
11 interest owner, has contributed capital to the development of  
12 the Marbaker impoundment and the Craige well pad. We  
13 stipulated to that because it's true. All working interest  
14 owners did.

15 What I think is most startling about the stipulation  
16 is what's not in it. Not a hint about contributing capital to  
17 the Wyalusing Creek water withdrawal facility. And you didn't  
18 hear one word of testimony that they contributed capital to  
19 build that facility. And that's because they didn't.  
20 Chesapeake designed it, constructed it, paid for it, and  
21 operated it. That's what ownership smells and looks like.

22 On the other assets, the Marbaker, no dispute. They  
23 contributed capital. And the Craige pad, they contributed  
24 capital. We are not disputing that. So did Equinor and so did  
25 everybody else. But don't come to court and say we own the

1     Wyalusing Creek water withdrawal facility and put up a document  
2     that's not accurate about the coordinates and still make an  
3     argument that they have some interest in it. If they thought  
4     they owned it, they would have put evidence in about  
5     contributing to the development of it.

6             Epsilon hasn't drilled or developed a well in the  
7     marcellus formation since, I think, 2009. It's 2021. They  
8     have nine employees. They don't have a contractor under  
9     contract. They haven't supplied what they need to supply to  
10    the DEP. And they admit that this is an extremely dangerous  
11    operation to conduct.

12            There is no reasonable interpretation that Epsilon has  
13    the ability to do what it's asking this Court to order.

14            There is not any evidence of a viable plan. The only  
15    evidence you heard is two executives have been in the industry  
16    a long time, both of them with Schlumberger. And from that,  
17    you are supposed to conclude that they have an indisputable and  
18    clear right to go ahead and do something like this.

19            They love to say well, the reason we don't have any of  
20    that done is because Chesapeake hasn't cooperated with us. You  
21    would expect if they were going to make that argument, Judge,  
22    that they would have put evidence before the Court of them  
23    sending Chesapeake the kinds of information that they admitted  
24    they haven't even developed.

25            These are good lawyers. If they wanted to argue that

1 Chesapeake is the sole factor that they are not ready to  
2 proceed, you would have seen the collision survey and all of  
3 the other work. And they would come to you and say we've done  
4 everything we're required to do, but Chesapeake is the problem.  
5 They didn't do that.

6 They tell a story about how there was a lawsuit two  
7 years ago. And then they introduce a chain e-mail. And from  
8 that, the Court is supposed to conclude that Chesapeake is the  
9 problem. The problem is they're not ready to go. They're not  
10 serious about going. They don't have the capacity to go.  
11 That's what came out.

12 And it would be frustrating enough if it was just  
13 about us and them. But it's about the public, too. It's about  
14 Rush Township. It's about the waters of the Commonwealth. And  
15 it's about the public safety.

16 Your Honor, I don't want to dwell on the JOAs. I  
17 think the Court has the full sense of them. I just want to  
18 make the point that I've probably made already; that there is  
19 only one operator-shifting provision in the JOA, and that's in  
20 Article VI 2(a), which has the interlineated language over  
21 which we disagree.

22 But there is another way for them to take over if they  
23 are such skilled operators. They could send a ballot out to  
24 all of the other joint interest owners and take a vote on  
25 whether Chesapeake should be removed because we're not acting

1     like a reasonably prudent operator. And they could do that  
2     under Article V. And if their colleagues in the industry  
3     agreed with them and there was a majority vote, Chesapeake  
4     would be removed. But that's -- they haven't done that.  
5     There's a concession that that's not what this case is about.

6             They want to come in under VI 2(a) without even notice  
7     to the other JOA-interested parties to have this Court do what  
8     they couldn't do if they went out to the other JOA parties, but  
9     the other JOA parties won't vote to remove Chesapeake. The  
10    other JOA parties don't own 35 percent of the Auburn gas  
11    gathering system like we can. Equinor -- I'm sorry.  
12    Chesapeake doesn't own any of the gas gathering system.

13            So what the Court is being asked to do is to shoehorn  
14    into this tortured language of VI 2(a) some extraordinary  
15    relief that they read into it by reading out the interlineated  
16    language.

17            Judge, we submit if this were a standard injunction  
18    where they were seeking to preserve the status quo, they would  
19    fall far short of that standard. But this is so different.  
20    There is no likelihood of success on the merits. There is no  
21    likelihood they will ever be ready to start operations on  
22    May 22.

23            They want to put boots-on-the-ground. Whose boots?  
24    Whose boots? Where's the contractor who would come in and say  
25    we're ready to go? Not their boots.



1           So Your Honor, it's not immediate. It's not  
2           irreparable. They don't have an indisputable claim for  
3           likelihood of success on the merits.

4           You've been extraordinarily patient. I'm most  
5           grateful to you and your staff for accommodating us on such  
6           short notice.

7           There is an issue about the bond. I just want to be  
8           respectful of the Court's time. If the Court wants to hear  
9           argument on the bond, I'd be happy to make it. If the Court  
10          doesn't think it needs it, that is okay, too. I would just add  
11          this. The counter-declaration that we got today from Mr. Paul  
12          Atwood, I guess he's one of the other nine employees, is that  
13          Epsilon has insurance. Epsilon is fully insured and bonded.

14          That's all fine and good, Judge. But Rule 65 of the  
15          Federal Rules of Civil Procedure, and I'm referring to 65,  
16          subpart (c) where it says, "The Court may issue a preliminary  
17          injunction or temporary restraining order only if the movant  
18          gives security in amounts that the Court considers proper to  
19          pay the costs and damages sustained to any party found to have  
20          been wrongfully enjoined or restrained."

21          That they are an insurable entity is utterly  
22          irrelevant to Rule 65(c). What, are they going to add all of  
23          the JOA parties as additional insureds? Who knows what's  
24          insured. That's not the purpose of the bonding requirement  
25          under 65(c). Mr. Atwood's declaration is of -- is not and

1 cannot be a substitute for a significant bond for this Court to  
2 conclude that it was going to grant any type of relief.

3 So I thank you for your time. I know it's been a long  
4 day. I think that's it.

5 THE COURT: Well, Mr. Brier, I do have one point of  
6 clarification. With respect to the declaration that's been  
7 admitted as Defendant's 42, you have addressed Mr. Atwood's  
8 declaration that was admitted at P-52, but Mr. Glenn's  
9 declaration includes a lot of different figures.

10 What is -- just in very brief terms, what is your  
11 position with respect to the amount -- I think in your papers  
12 prior to the hearing, you referred to it as there would need to  
13 be a significant bond. You have submitted a declaration that  
14 has a lot of different figures in it. What are you asking the  
15 Court -- if the Court were to require a bond, what amount are  
16 you asking for?

17 ATTORNEY BRIER: So, Judge, I misplaced it.

18 THE COURT: Are you looking for the declaration,  
19 Mr. Brier?

20 ATTORNEY BRIER: Yes.

21 ATTORNEY MADRIZ: Here you are.

22 ATTORNEY BRIER: Thank you.

23 So Your Honor, here is what the declaration  
24 establishes. It establishes that the Craige pad was developed  
25 at the cost of \$20.3 million. That is money that the working

1 interest owners all paid collectively based on their  
2 proportionate interests.

3 And it says in section seven that if the -- if the  
4 producing wells are damaged and production is not recovered  
5 because of the damage, the estimated foreseeable economic  
6 damage is the present value of \$1.618 million, which is the  
7 value of the lost reserves in those two producing wells, and  
8 approximately \$576,000 to plug, abandon and reclaim the wells.  
9 Once they are damaged, you can't just leave them. You have to  
10 go through a whole approved process to plug, abandon and  
11 reclaim them.

12 So if the wells were damaged and production could not  
13 be reestablished, the bond would need to be in the amount of  
14 \$2.1-odd million to protect Chesapeake from the damage.

15 If they damage the producing wells, but they're able  
16 to be reworked and deepened and sidetracked, because they're an  
17 existing wellbore, the estimated cost of that is \$980,000.

18 Then the royalty -- the landowners, Judge, get paid  
19 royalties on the gas produced from these wells. They would be  
20 harmed on a monthly basis to the tune of about \$18,000 if the  
21 wells were damaged.

22 Then the last point is, as the Court knows, Chesapeake  
23 has proposed a different well, the Koromlan well, which, by the  
24 way, they would share in the production of that. It would all  
25 go into the Auburn gas gathering system.

1           The estimated ---- the estimated present value of that  
2 well is \$12.9 million.

3           So if the Court were to enjoin us and say you can't  
4 develop the Koromlan well, we would be damaged to the amount of  
5 \$12.9 million, which is the net present value of that proposed  
6 well. If they go on the pad and cause damage to the existing  
7 producing wells, you know, the figures are there, depending on  
8 the damage that they would produce.

9           I hope that answers the Court's question.

10          THE COURT: It does. Thank you. All right. That was  
11 my only question. Yes.

12          ATTORNEY MADRIZ: Can I respond briefly on the bond  
13 issue, Your Honor?

14          THE COURT: Well, yes, although you presented no  
15 argument on it in your initial closing argument. Certainly.  
16 For the sake of completeness, yes.

17          ATTORNEY MADRIZ: Certainly, Your Honor. I think it's  
18 their position that they have to come up with the bond amount.  
19 I need to respond to it. I apologize we didn't do it in  
20 advance. I'll be very brief.

21          Judge, the fallacy in the argument of the 20.3 versus  
22 the 1.6576 and the 948 is that Mr. Glenn has said that the  
23 present value is 1.6 million. You would never put 20 million  
24 back in. The highest value would be 1.6 million. That's the  
25 present value of that well, the highest amount.

1           Again, then take back of that, we own 30 percent of  
2     that. Then there has to be some evaluation by this Court that  
3     there is something that we would do that would injure to get to  
4     that amount. Then back to again why we put Paul Atwood's  
5     counter-designation in is, one, there is insurance to cover if  
6     there is any issues that would result in it. Again, they would  
7     be covered. There wouldn't be any damage. The Court would  
8     then have to give an additional bond amount.

9           But if the Court -- again, I think 65 requires the  
10    Court to put in some bond amount. So this idea that it's  
11    millions of dollars, again, I would say is not correct on  
12    Mr. Glenn. The Pa. DEP requires a bond. And for 150 wells  
13    they require a bond of \$430,000.

14           So that bond is in place. That's an amount.

15           And the suggestion, back on the Koromlan well, the  
16    Koromlan well is not even in existence. It's a purely  
17    speculative number.

18           In terms of back to Mr. Glenn, if you go back to the  
19    evidence, and specifically the Chesapeake well proposal, it  
20    doesn't even have a commencement date contained within the  
21    Koromlan -- there is no Koromlan well out there right now. So  
22    again, this \$12 million is sort of a speculative issue that  
23    shouldn't be considered.

24           Back to what we would propose, again, Judge, I -- in  
25    this case, again, with the evidence before you, I think a

1 nominal amount is correct. I can't see an amount more than  
2 what the Pa. DEP put in. Even if you were going to say I'm not  
3 going to divide it by 150, that would be the upper limit in  
4 terms of a bond, because the regulatory agency has actually put  
5 the bonding amount out.

6 I think that's a better reflection versus some  
7 speculative nature that something is going to happen that's not  
8 insured that will result in some damage to Chesapeake. I just  
9 don't see that it's warranted to be in the millions of dollars.

10 ATTORNEY BRIER: Judge, may I have 30 seconds?

11 THE COURT: Yes.

12 ATTORNEY BRIER: The Pa. DEP bond is to protect Pa.  
13 DEP's interest. This bond, under Rule 65(c), is to protect the  
14 party found to have been wrongly enjoined or restrained. It's  
15 apples and oranges.

16 This Court has heard a lot of evidence, and we  
17 respectfully trust the Court. We don't think an injunction  
18 should be issued at all, so I'm loathe to talk about a bond.  
19 But if the Court found it needed to do something, the bond  
20 needs to be adequate to protect the interests, and that's what  
21 our declaration establishes.

22 THE COURT: All right. The evidence is submitted. I  
23 will issue an opinion as quickly as possible. You certainly  
24 understand the timing considerations.

25 Counsel, I have enjoyed spending two days with you. I

1 think everyone has done a fantastic job of getting the evidence  
2 before me. It's now in my hands. So have a wonderful  
3 afternoon. Court is adjourned.

4 ATTORNEY BRIER: Thank you, Your Honor.

5 ATTORNEY MADRIZ: Thank you, Judge.

6 (3:45 p.m., court adjourned.)

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Lori A. Fausnaught, RMR, CRR  
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